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SENATE

REPORT
100-164

THE ABM TREATY INTERPRETATION RESOLUTION

REPORT

OF THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

together with

ADDITIONAL VIEWS

SEPTEMBER 22, 1987.—Ordered to be printed

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SEPTEMBER 22, 1987.—Ordered to be printed

Mr. BIDEN, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. Res. 167]

The Committee on Foreign Relations, to which was referred the resolution (S. Res. 167) concerning constitutional principles pertinent to the making of treaties, and further concerning the interpretation of the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, having considered the same, reports favorably thereon with an amendment and recommends that the resolution as amended do pass.

I. PRINCIPAL PURPOSE

The Antiballistic Missile Treaty between the United States and the Soviet Union was approved by the Senate in 1972 by a vote of 88-2 without reservation or amendment, was subsequently ratified, and has been in force for 15 years. The purpose of the Treaty is to enhance nuclear stability by codifying a permanent ban on nationwide ABM systems, while sanctioning a highly restricted use of ABM systems for the defense of fixed sites.

American participation in the Treaty was based upon a broad consensus that a U.S.-Soviet competition in defensive systems would have two pernicious effects: (1) an accelerated deployment of offensive systems; and (2) greater instability—meaning greater risk of nuclear war—in time of crisis. The Treaty's aim was to constrain arms race instability and crisis instability.

The treaty's mechanism was to impose a comprehensive and permanent ban on the development, testing, and deployment of mobile and space-based systems—systems which might be used in an effort to erect a nationwide defense—while permitting a limited deployment of fixed land-based ABM systems to facilitate the protection of each side's retaliatory capability.

In 1985, however, the Reagan Administration moved to undermine the very premises of the ABM Treaty by asserting a so-called "reinterpretation" of the Treaty under which the development and testing of mobile and space-based systems would be permitted. Not coincidentally, this action followed a series of presidential statements which, by touting the need for a ballistic missile defense, questioned the Treaty's entire rationale.

The Reagan Administration's "reinterpretation" of the ABM Treaty has raised profound constitutional issues concerning presidential latitude, and presidential obligations, in the interpretation and implementation of solemn U.S. treaty commitments. S. Res. 167 is intended to address those issues, both generally and specifically, and to provide a means for the Senate to declare itself concerning the proper interpretation of the ABM Treaty.

S. Res. 167 is not an attempt, in a strict legal sense, at treaty interpretation. That the Senate cannot do. Treaty interpretation is a President's prerogative and responsibility; and issues of treaty interpretation can, in a domestic context, be resolved ultimately only by the courts.

But the President's treaty interpretation power is not a carte blanche. Constitutionally, it must be exercised within limits determined by principle and fact. S. Res. 167 constitutes a Senate affirmation of (1) constitutional principles pertaining to treaty interpretation; (2) facts pertaining to the ABM Treaty; and (3) conclusions which follow therefrom—among them, that only the traditional interpretation of the ABM Treaty is valid and constitutional.

Using a technique that George Orwell would have understood, the Reagan Administration quickly adopted the convention of referring to its unilateral "reinterpretation" of the ABM Treaty as the "legally correct interpretation (LCI)." As this report will make clear, the Committee regards the "reinterpretation" as legally incorrect—indeed flagrantly unconstitutional.

II. Background: Purpose and Meaning of the ABM Treaty

A. NEGOTIATION OF THE TREATY

1. Origins of the Negotiation

The 1972 Anti-Ballistic Missile Treaty was negotiated, signed, and ratified during the first term of President Nixon as part of the SALT I accords. The U.S. decision to seek a treaty limiting ABM systems originated, however, in the Johnson Administration.

In the mid 1960s, American officials became concerned about the imminent Soviet deployment of the "Galosh" ABM system around Moscow, which raised the prospect of a nationwide Soviet defense deployed in accompaniment with offensive nuclear capabilities that were rapidly expanding. Meanwhile, the United States faced important decisions on the modernization of its own forces. In 1965, President Johnson authorized the development of MIRVs for both the Minuteman III ICBMs and Poseidon SLBMs, principally to increase the number of warheads that could be launched against any Soviet ABM system that might be deployed. Decision was also pending on the "Sentinel" ABM program, which was intended to defend against increasing Soviet offensive forces and, more generally, to respond to Soviet ABM activity.

Recognizing the interaction between U.S. and Soviet force developments and hoping to prevent a drastic escalation in defense spending, U.S. policymakers began to formulate three important principles with regard to nuclear forces:

—First, the United States could limit its offensive force requirements through the concept of assured destruction—by deploying only such forces as necessary to ensure a retaliatory capability that would inflict unacceptable damage on the Soviet Union.

—Second, mutual deployment of nationwide ABM systems would inevitably intensify the arms race as each side sought to increase its offensive forces to ensure its ability to overcome the other's defenses. Each side would feel compelled to do so in order to deprive the other of the ability to strike first with impunity.

—Third, in addition to arms race instability, mutual deployment of nationwide ABM systems would contribute to crisis instability. Defenses are inherently more effective against a disorganized retaliatory strike than against a well-planned first strike. Thus, in any circumstance where war seemed probable, each side's desire to maximize its chances of survival could create a powerful first-strike incentive.

Together, these principles led to a determination, widely held inside and outside the U.S. Government, that the superpowers should forego seeking nationwide defenses. Such an outcome would codify the principle of mutual assured destruction, prevent a spiraling competition in defensive and offensive systems, and lessen the dangers of nuclear war. It could also make possible a negotiated halt—and even a reversal—in the relentless build-up of strategic nuclear arms.

With Secretary of Defense McNamara an active proponent of this widely-held view, the Johnson Administration sought a means to implement these objectives. In June 1967, during their spontaneously arranged Glassboro summit with Soviet Premier Kosygin, President Johnson, and Secretary McNamara emphasized the urgent requirement for limits on ABM systems, lest the deployment of such systems give rise to an intensified arms race and nuclear instability. Apparently unconvinced of the danger, however, Kosygin refused to commit the Soviet Union to negotiation on defensive limitations. His immediate response to the U.S. concern with ABMs presaged by 16 years President Reagan's Star Wars speech of 1983: What, after all, could be wrong—morally or strategically—with trying to build an anti-nuclear defense?

Toward the end of the Johnson Administration, the Soviet position changed, and the two sides agreed to commence negotiations on offensive and defensive arms on September 30, 1968. In August of that year, however, the Johnson Administration broke off this plan in response to the Soviet invasion of Czechoslovakia.

Entering office in 1969, President Nixon ordered a study of the options for ABM deployment and negotiations. Operationally, the Administration reconfigured the Sentinel system into a "Safeguard" system designed to provide a 12-site defense of U.S. ICBM silos, and in August 1969 gained narrow congressional approval to proceed. Meanwhile, for motives identical to those of its predecessor, the Nixon Administration determined to resume a negotiating effort aimed at severely limiting ABM systems. Those motives were to prevent an escalation of the arms race, to increase nuclear stability, and to establish the prerequisite—limits on defensive systems—to significant constraints on offensive arms.

2. *Overall Aims of the SALT I Negotiators*

While the U.S. and Soviet negotiators at SALT I initially differed with regard to how offensive systems should be limited, the two delegations were in basic agreement on the desirability of prohibiting nationwide ABM systems. At the preliminary SALT sessions from November to December 1969 in Helsinki, the chief Soviet delegate, Vladimir Semenov, clearly indicated that limiting ABMs was a primary Soviet aim; he agreed with the American negotiators on the dangers of a "thick" defense of either side's national territory. Other Soviet officials added that a "light" nationwide defense was equally dangerous because it could easily be converted to a "heavy" defense.

When real negotiations began in Vienna at the second round, from April to August of 1970, the two sides quickly agreed to limit each side's ABM deployments to a very low level. Thus, it was clear from the outset of the ABM Treaty negotiations that the aim was to prevent either side from building a nationwide defense.

At the same time, both sides sought to allow certain carefully limited ABM deployments at fixed sites on the premise that nuclear stability could be strengthened by ABM deployments that helped each side to protect its command and control facilities and some part of its land-based retaliatory force. This concept required a distinction, however, between systems inherently suitable for nationwide defenses and those which could be limited to the defense of a fixed site.

The proposed U.S. Safeguard system and the Soviet ABM system around Moscow were both limited to the defense of certain discrete areas and were thus regarded as consistent with the governing standard of stability. Each side's system consisted of launchers, missiles, and radars that were to be deployed at fixed locations on land and could not easily be transported to other locations.

Mobile ABMs, however, such as those based in space or at sea, could, by their very nature, potentially defend large areas and contribute to a nationwide defense. Because of this potential, both sides—early in the negotiations—tabled treaty language which prohibited all activities beyond basic research on mobile systems, while allowing fixed land-based ABMs at restricted locations in restricted quantities.

3. The Question of Future Systems

The first four SALT sessions bogged down on the important procedural and substantive question of the connection between limits on offensive systems and defensive systems. Both delegations spelled out their approaches, but serious work toward bridging differences over specific limits was held hostage to the impasse over the framework of the talks and the linkage between offense and defense. On May 20, 1971, this hurdle was overcome. In a joint statement, the two sides announced agreement "to concentrate this year on working out an agreement for the limitation of the deployment of antiballistic missile systems, ABMs" along with "certain measures with respect to the limitation of offensive strategic weapons."

At the fifth session in Helsinki from July to September 1971, the two delegations began serious work on the details of an agreement to limit defenses. The parties had basically agreed already to ban mobile ABMs and to allow only a small deployment of fixed ABMs. But only now did they address the issue of whether their prospective agreement should cover only existing ABM systems or all possible systems which might be developed in the future.

On this issue, the U.S. delegation received instructions based upon National Security Decision Memorandum (NSDM) 117, issued on July 2, 1971. The delegation was instructed that "the [ABM] agreement should make clear that any systems for rendering ineffective strategic ballistic missiles or their components in flight trajectory are prohibited unless permitted by this agreement." [1] The U.S. negotiators were instructed not to table a specific provision on the issue, pending the outcome of a U.S. Government study on future ABM systems. In Washington, a serious policy issue had arisen as to how much latitude should be allowed for the pursuit of future ABM systems, such as lasers, which could be deployed at fixed land-based sites. Disagreement also surrounded the issue of verifying compliance with the limits set on the development and testing of future ABMs.

At this juncture, in a series of personal messages to President Nixon, the chief U.S. negotiator, Ambassador Gerard Smith, argued strongly that the treaty's prohibitions should apply to both present and future ABM systems. In one of these communications, he asked rhetorically, "Do we seek . . . just a temporary truce in ABMs—until such time as more effective futuristic ABMs are developed and deployed?"

In August 1971, the U.S. position on future ABM systems was resolved after inter-agency deliberations led to the issuance of NSDM 127, pursuant to which new instructions were sent to American negotiators in Helsinki. With respect to future ABM systems, this directive read:

> The agreement should contain a provision whereby neither side shall deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the function of these components. (This

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[1] This quotation, and other quotations in this report concerning events during the ABM Treaty negotiation, are taken from materials provided to the Senate in August 1986 by the Department of State. All quotations used have been declassified.

> provision along with that in the next paragraph, should not prohibit the development and testing of future ABM components in a fixed, land-based mode.)
>
> The agreement should contain a provision whereby neither party shall develop, produce, test, or deploy: (a) sea-based, air-based, space-based, or mobile land-based ABM launchers, ABM missiles, or ABM radars; (b) ABM components other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.
>
> In presenting this position, the Delegation should not invite a detailed negotiation or discussion of future ABM systems. Our objective is to reach agreement on the broad principle that the agreement should not be interpreted in such a way that either side could circumvent its provisions through future ABM systems or components. We intend to handle any problems that may arise through the Joint Commission and the formal review procedures.

In summary, the American policy established by NSDM 127 aimed at banning all activities (except basic research) related to mobile ABM systems using future technologies and at banning deployment of fixed land-based ABMs using future technologies. Thus, the U.S. sought an agreement embodying what is now referred to as the traditional or "narrow" interpretation—meaning an agreement containing broad restrictions on existing and future ABM systems. In obtaining agreement to these bans, however, the U.S. hoped as a tactical matter to avoid any discussion of specific technologies which might reveal U.S. aims with regard to developing new fixed land-based systems.

On August 17, 1971, the U.S. delegation presented a draft treaty article governing both mobile and fixed land-based systems. Relevant portions read as follows:

> (1) Each party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.
>
> (2) Each party undertakes not to develop or produce or test or deploy in sea-based, air-based, space-based, or mobile land-based modes: ABM interceptor missiles, ABM launchers, ABM radars, or other devices to perform the functions of these components.

When proposing this language, the U.S. delegation made explicit reference to the fact that it would result in limits on future ABMs. Ambassador Smith told the Soviet delegation that "the Agreement would apply to all types of ABM systems, including possible future types of ABM systems and not only to ABM systems employing ABM interceptor missiles, ABM launchers, and ABM radars. We believe that the Agreement should reflect this explicitly."

The initial Soviet reaction was cautious. At first, the Soviets posed specific questions as to the desirability and feasibility of including limits on exotic systems. Significantly, the focus of the Soviet questions was the prohibition on deployment of futuristic fixed land-based systems—not the comprehensive ban on mobile systems. On several occasions, Soviet delegates probed as to what the U.S. side contemplated with regard to developing a future ABM system which did not include launchers, interceptor missiles, and radars.

In accord with its instructions, the U.S. delegation refused to give specific examples and continued to reiterate why the agreement should limit future systems. With respect to the U.S. language banning all development and testing of mobile systems, the Soviet reaction was limited to questions about the meaning of the term "development" and how a prohibition on development could be implemented.

On September 3, 1971, the two sides agreed to assign work on this draft article to an Ad Hoc Committee, co-chaired by U.S. delegate Sidney Graybeal and Soviet delegate Viktor Karpov. On September 8, Graybeal explained that the U.S. proposal was "intended to address future ABM systems that would utilize components or devices other than launchers, interceptor missiles, or radars." Karpov voiced skepticism over limits on deployment of fixed land-based systems using "other devices," saying that "if the U.S. side believes that such systems exist in reality, then it should identify and name them so that the possibilities to limit them could become clear" and that he "could not agree to an approach designed to prevent deployment in the future of certain systems when the systems to be limited are undefined."

Karpov suggested that future systems could be handled in the Standing Consultative Commission (SCC) to be set up by the treaty. Pursuant to his instructions, Graybeal argued that "an operative article indicating clearly the obligations with regard to improvement of existing ABM systems and with regard to future systems would be far more useful than merely referring these questions to the Standing Commission."

Resolution on Future Mobile Systems.—While questioning the U.S. approach to fixed land-based systems, the Soviet side quickly demonstrated its acceptance of the U.S. position on mobile ABMs—both present and future. On September 8, Karpov proposed new language regarding mobile ABMs, describing his text as an attempt "to merge the language" of the two sides' positions. The Soviet proposal on mobile ABMs read:

> Each party undertakes not to construct, not to test and not to deploy mobile land-based, sea-based, air-based or space-based, ABM systems and their components, specially constructed for such systems.

On September 13, Karpov further described the new Soviet proposal on mobile systems as a way to take "into account the wishes of the U.S. side."

The crucial meeting on mobile ABMs occurred on September 15, 1971. There, Karpov argued that by substituting the general word "components" for the list of radars, launchers and missiles, the new Soviet text "obviates the requirement for the phrase 'other devices for performing the functions of these components' " in the U.S. proposal. According to the U.S. record of the meeting, "Karpov agreed with Graybeal's interpretation that the Soviet text meant 'any type of present or future components' of ABM systems." Satisfied that he had achieved Soviet agreement to the U.S. position, Graybeal said he "would take the new Soviet formulation into consideration and refer it to the U.S. delegation."

(On April 29th this year, Graybeal tesified to the Foreign Relations Committee that these September 1971 exchanges made clear that "the Soviets did understand that we were limiting future systems; and they did agree that Article V did provide such limitations . . . there is no question in my mind that Karpov understood. . . .")

Following some minor changes, the two delegations soon agreed on final language governing mobile systems. This provision, which became Article V(1), read:

> Each party undertakes not to develop, test, or deploy sea-based, air-based, space-based, or mobile land-based ABM systems or their components."

On September 23, 1971, the last day of the fifth session in Helsinki, the U.S. delegation reported to Washington that language on mobile ABM systems "including components for future ABM systems which are not fixed and land-based . . . was agreed to ad referendum." Some weeks later, when the sixth session began in Vienna, the Soviet delegation stated with regard to Article V(1) that the "results of this work had been confirmed in Moscow during the interval between Helsinki and Vienna."

Thus, by that point in the negotiation the U.S. delegation had, in large measure, implemented NSDM 127's instructions to obtain a total ban on any future development, testing, and deployment of mobile ABMs. Two issues affecting future ABM systems did, however, remain:

—First, a definition was still needed of precisely what constituted an ABM system;

—Second, agreement was still needed on the question of limiting deployment of fixed land-based ABMs based upon future technologies.

Resolution on ABM System Definition.—The critical negotiation on ABM definition occurred on December 20 and 21, 1971. By this time, the delegations had tasked a working group—Raymond Garthoff and J. Graham Parsons for the U.S. and delegates Grinevsky and Kishilov for the Soviets—to finalize a definition in Article II.

The U.S. approach to the definitional requirement was "functional": to define an ABM system as *any* system that could perform the functions of intercepting ballistic missiles. The Soviet delegation began with an approach whereby an ABM system was defined essentially as consisting of ABM interceptor missiles, ABM launchers, and ABM radars.

On December 20, Garthoff proposed a U.S. draft embodying the functional approach. The initial sentence defined an ABM system as "a system to counter strategic ballistic missiles or their elements in flight trajectory." Subsequent sentences then described and defined ABM missiles, ABM launchers, and ABM radars. The U.S. draft did not contain language connecting the sentence which defined an ABM system with the subsequent sentences defining certain existing components. After examining the U.S. proposal, Grinevsky observed that "his Delegation strongly believed that there should be some connective such as 'namely' or 'consisting of.' " According to the U.S. negotiating record, Garthoff then said that:

> the American side did not consider that a connective of this kind was either necessary or desirable. If, however, there were to be one, it should be precise. Therefore, he suggested, we might consider use of the phrase "currently consisting of" as a connective.

In making this change, Garthoff explained that this language would demonstrate that the term "ABM system" would apply to both present and future ABMs, as the U.S. team had proposed in the past. He also recalled the understanding of both sides that Article II would not impose limits or regulations but merely define an ABM system. How and to what degree ABMs would be constrained was to be determined by other articles.

After Garthoff provided this critical justification for inserting the words "currently consisting of," Grinevsky agreed to take up the proposal with his delegation. On the following day, December 21, the Soviet side presented a new draft of Article II, incorporating the words "currently consisting of." Grinevsky and Kishilov both highlighted the significance of this insertion, suggesting that agreeing to this language was an important Soviet concession. Indeed, Soviet acceptance of this language served to confirm the September 15 agreement on banning future mobile ABMs, which may not have been fully clear from the text of the treaty if the definition of an ABM system did not explicitly cover both present and future ABM systems.

The Soviet side stressed that, in the course of accepting the U.S. proposal on Article II, "a very delicate situation within the Soviet delegation" had developed and that "the expression 'currently consisting of' had been strongly objected to by some members of the Soviet delegation." This comment demonstrated that *the Soviet delegation fully understood* that the effect of incorporating the U.S. language in Article II was to accept the broad, functional definition of an ABM system.

On December 22, Article II was added to the Joint Draft Text as a provision fully accepted by both parties. The U.S. delegation had secured language which ensured that future ABMs were covered and which reinforced the September agreement on Article V(1): that mobile ABMs, both existing and future, would be limited to the research stage.

Having current access to the U.S. negotiating record from that period, the Committee has found no statements or proposals made by either delegation after the completion of Article II on December 22, 1971, contradicting or casting doubt on the September 1971 agreement banning future mobile ABMs. The delegations did continue to discuss Article V, but those discussions were focused entirely on the question of fixed land-based ABMs using future technology.

Resolution on Future Fixed Land-Based Systems.—The U.S. had first proposed, in August 1971, that the treaty prohibit deployment of fixed land-based ABMs using future technology. But even after agreement on banning future mobile systems in September and agreement on a functional definition of ABM systems in December, the question of future fixed land-based ABMs remained outstanding—a bracketed passage in the draft treaty.

Between December 1971 and May 1972, the U.S. delegation finally obtained Soviet agreement to ban deployment of future fixed land-based ABM systems. This development came as a result of a series of steps involving three provisions of the treaty: Articles I and III, and Agreed Statement D.

In December 1971, the Soviet delegation proposed that Article I include an undertaking not to deploy ABM systems for a defense of either side's territory. Soviet delegate Kishilov described the Soviet proposal as a "partial substitute" for the earlier U.S. proposal explicitly banning future fixed land-based systems. The U.S. delegation accepted the new Soviet language, but insisted that specific language prohibiting future fixed land-based systems was still required.

By this time, the U.S. delegation had been authorized to provide examples of future ABM systems—a response to the Soviet argument that future ABMs should be identified to the degree possible. Thus, on December 10, 1971, U.S. delegate Harold Brown specified that "lasers and particle accelerators" would be covered by the proposed ban.

This U.S. specificity helped to reveal, later that day, an important facet of the Soviet rationale for objecting to a deployment ban on future fixed land-based ABMs. In an exchange with U.S. delegate Paul Nitze, Soviet negotiator Shchukin explained that Article I of the treaty should ban deployment of future ABMs that could protect large areas, but he argued that future technology might make the permitted deployments at fixed sites more efficient. Further, Shchukin said, if future technologies were so powerful as to render meaningless any numerical restrictions on fixed land-based systems, that issue could be discussed in the Standing Consultative Commission. The Soviet Union, he affirmed, would not deploy such future systems unless prior agreement had been reached in the SCC.

This statement placed the Soviet position in general harmony with the U.S. objective, which was to allow development and testing of future fixed land-based ABMs but to make deployment dependent upon subsequent agreement.

Thus, on December 17, U.S. delegate Garthoff suggested the possibility that the explicit ban on future fixed land-based systems need not necessarily be part of the treaty, so long as the substance of the U.S. position was maintained—that position being that fixed systems deployed for the protection of designated sites must, if based on new technologies, be subject to subsequent agreement. On December 21, when Garthoff transmitted proposed language for the agreed interpretation, he said, "while maintaining our basic position on this matter, the U.S. side is willing to drop [the specific ban] if there is a clear agreed understanding."

This proposed understanding was to be tied to Article I, which contained the general ban on nationwide ABM systems, and Article III, which specified—through quantitative and qualitative limits—the permitted ABM deployments at designated locations.

A meeting on January 31, 1972, clarified that the sides were agreed on two important points:

—First, the combination of Article I, II, and III would prohibit the deployment of future fixed land-based ABMs even without an agreed understanding.

—Second, the agreed understanding would require that future deployment of components based on "other physical principles" be subject to discussion and agreement in the SCC if the new technology could substitute for the components permitted in Article III—but not if the new technology merely served as "adjuncts" to those components. (For example, telescopes using future technology could be used to assist ABM radars in discriminating between real incoming warheads and decoys; such "adjuncts" would not be subject to further agreement because they would supplement, rather than substitute for, ABM launchers, missiles, and radars.)

At that January 31 meeting, Garthoff presented and read aloud a prepared paper entitled "Statement on 'Future ABM Systems,'" which expressed these two points clearly. It confirmed that no ABM systems could be deployed except as provided for in Article III and that Article III "should be drafted so as not to permit the deployment of devices other than ABM interceptor missiles, ABM launchers, or ABM radars to substitute for and perform their functions." The paper also stated that "Devices other than ABM interceptor missiles, ABM launchers, or ABM radars could be used as adjuncts to ABM systems provided that the devices could not perform the functions of and substitute" for these three existing components.

The mutuality of understanding on these points was demonstrated when Soviet delegate Grinevsky, after reading the prepared paper, responded by stating that "he believed there was complete agreement." Within two days, the delegations had concurred on the language of an understanding—Agreed Statement D—stipulating that the superpowers would consult and reach agreement in the course of deploying future systems that would replace the fixed land-based ABMs permitted by the treaty.

On April 26, pursuant to this January discussion, the U.S. delegation proposed the following lead-in language for Article III, which permitted certain ABM deployments: "Each party undertakes not to deploy ABM systems or ABM components except as follows: . . ." On April 28, Soviet delegate Grinevsky stated that his side could agree to such a formulation whereby neither side could deploy ABM systems or their components "except as the Article would provide" and that "this would ban 'other systems.'" The final text, agreed to and signed by President Nixon and General Secretary Brezhnev the following month, incorporated the U.S. approach on fixed land-based systems using future technology.

Retrospect.—During the Committee's hearings on March 11 this year, Lt. Gen. Royal Allison (ret.), the U.S. delegate representing the Joint Chiefs of Staff during the ABM Treaty negotiations, submitted a statement signed by all principal members of the negotiating team except Ambassador Nitze. Their joint testimony was as follows:

> We are convinced that the Soviet negotiators shared our view that the Treaty bans the development and testing, as well as deployment, of all space-based and other mobile-based ABM systems and components, regardless of whether they use 1972-era or newer technologies.

On March 26, Ambassador Smith, the head of the delegation, testified that he had recently discussed with Henry Kissinger, President Nixon's national security adviser in 1972, the question—implicit in the "reinterpretation" controversy—of whether the delegation had successfully fulfilled the goals established by NSDM 127, which were to prohibit the deployment of all ABMs using future technology, while permitting new-technology development efforts solely in the area of fixed land-based systems. According to Smith, Kissinger authorized him to affirm in public testimony Kissinger's belief that the delegation had carried out its orders in full, securing Soviet acceptance of the key U.S. goals for the Treaty.

B. TEXTUAL ANALYSIS

The preceding review of the ABM Treaty negotiating history serves to underscore how carefully and effectively the U.S. delegation carried out President Nixon's August 1971 instructions on future ABM systems. Given the inherent complexities in a negotiation as both sides seek to protect their own interests, the story of the ABM Treaty negotiation is remarkably straightforward and it produced a text that is remarkably clear.

1. Object and Purpose of the Treaty

The Vienna Convention on the Law of Treaties dictates that the meaning of a treaty is to be determined, first and foremost, by examining the treaty text. The Vienna Convention provides that the text "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Clearly, the "object and purpose" of the ABM Treaty negotiation was to codify, and render permanent, a condition whereby neither superpower could defend itself against an intercontinental missile attack. Achieving this "object and purpose" required not only a ban on the deployment of nationwide defenses. It also required a prohibition on development and testing of nationwide defenses up to a point of readiness to deploy.

At the same time, that "object and purpose" included a desire to permit carefully limited uses of defensive systems—to protect fixed sites. Thus, while one express purpose was to prohibit nationwide defenses, another was to permit ABM defenses of two specific areas—the national capital and one ICBM deployment area. Because space-based and other mobile ABM systems are inherently suitable for a nationwide defense and cannot be confined to a single site, these systems were treated more severely than fixed land-based systems.

2. The Treaty Text

The essence of the ABM Treaty is contained in only a few of its provisions:

Article I of the Treaty articulates the Treaty's "object and purpose" with clarity: "Each party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty." The remainder of the Treaty consists of a series of articles and attached statements which express the specific obligations of the parties in fulfilling this "object and purpose."

Article II provides the critical definition of what constitutes the subject matter to be limited: "For the purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of: (a) ABM interceptor missiles . . . (b) ABM launchers . . . (c) ABM radars." This is a functional definition. An ABM system is defined as *any* weapon system functionally able to "counter strategic ballistic missiles or their elements in flight trajectory." The fact that an ABM system could include components based on new technologies is expressly referred to by the phrase "currently consisting of." By stating that ABM systems "currently" consist of missiles, launchers, and radars, the language clearly indicates that ABM systems could consist of other components. Otherwise, the word "currently" would not be necessary.

Article III stipulates the specific quantitative, qualitative, and geographic limits on permitted deployments of fixed land-based ABM systems consisting of interceptor missiles, launchers and radars. The opening clause reads: "Each party undertakes not to deploy ABM systems or their components except that . . ." By means of this lead-in language, Article III makes clear that all deployments are prohibited except those expressly permitted—meaning that deployment of future ABM systems and components are not allowed. The provision states that at two geographically designated areas, "a Party may deploy . . . no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites [and certain] ABM radars . . ." By limiting the capability of permitted systems, and by imposing specific qualitative and geographic limits, Article III is designed to prevent circumvention of the Article I ban on any nationwide defense.

Article V serves not only to elaborate on the general ban on nationwide defenses but to prevent either side from developing the means to deploy such a defense: "Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." Because space-based and other mobile ABM systems are inherently capable of a nationwide defense, these systems are confined to the basic research stage. And because of the functional definition of an ABM system in Article II, this broad ban on developing, testing, or deploying space-based and other mobile systems applies both to existing and future systems—that is, to any mobile ABM system regardless of whether its components include interceptor missiles or high-powered lasers capable of substituting for such missiles.

Article XIII provides for creation of the Standing Consultative Commission, with a mandate to consider ambiguities in interpretation of the Treaty and possible amendments to the Treaty.

Article XIV provides a procedure for amendment of the Treaty.

Article XV provides that the Treaty "shall be of unlimited duration," meaning that a premise of the Treaty was that it would entail permanent obligations—not to deploy ABM systems or to provide a base for such systems. This provision was consistent with the functional definition of an ABM system contained in Article II, which had the effect of bringing the Treaty's prohibitions to bear on future as well as existing technology.

Finally, among a number of interpretive "agreed statements," *Agreed Statement D* supplements Article III, which defined permissible fixed land-based systems. This connection is made clear in the opening clause of Agreed Statement D: "In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty . . ." Agreed Statement D goes on to provide that if future fixed land-based systems are created, their deployment "would be subject to discussion in accordance with Article XIII [procedures of the SCC] and agreement in accordance with Article XIV [amendment procedure]." Thus, while Agreed Statement D provides a mechanism to consider deployment of future fixed land-based ABM systems, it makes clear that deployment of such systems would require formal amendment of the Treaty.

3. A Question of Redundancy

During recent controversy over the ABM Treaty's meaning, advocates of the "reinterpretation" have argued that if the main body of the Treaty truly prohibited the development, testing, and deployment of future mobile ABM systems, and the deployment of future fixed land-based systems, Agreed Statement D would be unnecessary—redundant. They have argued that Agreed Statement D's existence, its recognition that future systems might indeed be developed, and its ban on deployment of future systems, are evidence that future systems are not covered elsewhere in the Treaty.

But this argument overlooks the Treaty's crucial distinction between permitted and prohibited systems. The Treaty envisages that future ABM systems may indeed be developed and tested—for the purpose of protecting individual sites. NSDM 127 instructed the U.S. delegation to achieve precisely that result: the Treaty "should not prohibit the development and testing of future ABM components in a fixed land-based mode."

What the U.S. delegation sought was an agreement which would allow laser technology to be developed for the purpose of protecting individual sites, and even deployed in an "adjunct" mode without further negotiation, but which would not allow either side to circumvent the Treaty's broad prohibitions through future ABM systems or components. While the Treaty would have held together logically without Agreed Statement D, its inclusion served to delineate, with elegant precision, a distinction considered important by the U.S. side:

> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

Agreed Statement D also served to state explicitly and to give positive affirmation to what would otherwise have been only implicit in the text of the Treaty: that the two parties were agreed that they would actively consult as new technologies appeared and would seek agreement to deploy those technologies only in a manner acceptable to both sides.

Thus, Agreed Statement D was assigned a role perfectly suitable for a provision appended to the main text: the delineation of points which, though implicit in the Treaty, warranted explicit affirmation.

C. RATIFICATION PROCEEDINGS

The signing of the ABM Treaty by President Nixon and General Secretary Brezhnev on May 26, 1972, did not bring the Treaty into force. A second step was required: the mutual deposit of instruments of ratification—a step which the U.S. Government could take, under the Constitution, only "by and with the advice and consent of the Senate . . . provided two-thirds of the Senators present concur." On June 13, 1972, the President submitted the ABM Treaty to the Senate seeking Senate approval that the Treaty be ratified.

1. The Executive Branch: Unanimity of Understanding

During the final stages of negotiation and in preparation for the upcoming ratification debate, the legal adviser to the U.S. delegation, John Rhinelander, wrote a series of memoranda, based on discussions with delegation members, in an effort to articulate with clarity and detail the meaning of the Treaty. According to its author, the final Rhinelander memorandum, dated May 24, 1972, "reflected the views of the entire U.S. delegation." That memorandum is significant as a contemporary expression of what the U.S. delegation viewed the Treaty to mean.

The Rhinelander memorandum explains that Article II's definition is functional and applies to all ABM systems and components—those employing traditional technology and those employing future technology. It also clearly states that the broad ban on mobile ABMs in Article V applies to both present and future ABMs. Following are relevant excerpts from the memorandum:

> An ABM system is described in paragraph 1 of Article II in terms of "current" components. This does not, however, limit the generality of the term ABM system as used in the Treaty to systems composed of "current" ABM components, but would also include "future systems" based on

> physical principles other than those used for "current" ABM components and capable of substituting for a "current" ABM component . . .
>
> Paragraph 1 of Article V prohibits the development, testing, or deployment of: An ABM system that is sea-based, air-based, space-based, or mobile land-based; an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, air-based, space-based, or mobile land-based; a device capable of substituting for an ABM interceptor missile, ABM launcher or ABM radar that is sea-based, air-based, space-based, or mobile land-based (such as an air-based "killer" laser).

According to Rhinelander, "there is no doubt whatsoever that the entire U.S. delegation, including Paul Nitze, reviewed and agreed on this issue in 1972." This point is not disputed by Ambassador Nitze even now.[2]

In preparation for and during the Senate ratification proceedings, the Rhinelander memoranda were relied upon heavily by the U.S. delegation and other key Administration officials as the definitive Executive Branch view of the meaning of the ABM Treaty. The Treaty's textual clarity and these undisputed interpretive memoranda provided for a unanimity of interpretation within the Nixon Administration. (During the Committee's hearings this year, that unanimity was underscored in retrospect by then Secretary of Defense Melvin Laird in a statement submitted for the record.)

2. The Senate: Unanimity of Understanding

The official Executive Branch submission to the Senate on June 13, 1972, contained three categories of documents: the texts of the ABM Treaty and the SALT I Interim Agreement on Strategic Offensive Arms, signed by Nixon and Brezhnev; agreed statements relating to the two accords, signed by the heads of the negotiating delegations; and an explanatory Letter of Submittal signed by Secretary of State Rodgers and addressed to President Nixon.

a. Letter of Submittal

As the official Executive Branch interpretation of the meaning of the ABM Treaty, the Letter of Submittal occupies an important place in the record of what the Senate was given to understand about the Treaty in the course of consenting to ratification. The Letter tracks the text of the Treaty and describes the effect and meaning of its various provisions.

According to the Letter, "Article V limits development and testing, as well as deployment, of certain types of ABM systems and components. Paragraph V(1) limits such activities to fixed, land-based ABM systems and components by prohibiting the development, testing or deployment of ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."

Another part of the Letter, under the heading "Future ABM Systems," states as follows:

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[2] See John B. Rhinelander and James P. Rubin, "Mission Accomplished: An Insider's Account of the ABM Treaty Negotiating Record," Arms Control Today, September 1987.

> A potential problem dealt with by the Treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. The treaty would not permit the deployment of such a system or of components thereof capable of substituting for ABM interceptor missiles, launchers, or radars: Article II(1) defines an ABM system in terms of its function as a "system to counter strategic ballistic missiles or their elements in flight trajectory," noting that such systems "currently" consist of ABM interceptor missiles, ABM launchers, and ABM radars.

It is noteworthy that, in explaining the Treaty's effect on future systems, the Letter refers to the definition in Article II. If Article II had been intended to apply only to systems based on technology available in 1972, it would hardly be applicable to the question of future systems. Instead, the Letter emphasizes that the Treaty's limitations on ABM systems apply to any system that can perform the "function" of an ABM system.

Taken together, these two passages unambiguously present the Treaty as banning the development, testing, and deployment of *any* mobile or space-based, ABM system, regardless of the technology involved.

b. Ratification Hearings: Armed Services Committee

Hearings before the Senate Armed Services Committee clearly established, on more than one occasion, that the ABM Treaty banned the development and testing of mobile and space-based ABM systems and components using future technology. Several exchanges warrant note:

On June 22, during the appearance of Dr. John Foster, the DOD Director of Defense Research and Engineering, Senator Jackson inquired as to just how Article V would affect the ability to conduct research:

> Senator JACKSON. What does this do to our research? I will read it to you—section 1 of Article V. This is the treaty: "Each Party undertakes to develop"—it hits all of these things—"not to develop, test or deploy ABM systems." You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or."
>
> Dr. FOSTER. One cannot deploy a fixed land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile.
>
> Senator JACKSON. You can't even test; you can't develop.
>
> Dr. FOSTER. You can develop and test up to the deployment phase of future ABM system components which are fixed and land based . . . You can use lasers in connection with our present land-based Safeguard system provided that such lasers augment, or are an addendum to, current ABM components. Or, in other words, you could use lasers as an ancillary piece of equipment but not as one of the prime components either as a radar or as an interceptor to destroy the vehicle.

With regard to future technology, this exchange underscored that only fixed land-based ABMs could be developed and only "ancillary" equipment could be deployed without prior agreement.

The question of future technology was discussed again on July 19, during the testimony of General Bruce Palmer, Acting Chief of Staff of the Army:

> General PALMER. We can look at futuristic systems as long as they are fixed and land-based.
>
> Senator JACKSON. I understand.
>
> General PALMER. The chiefs were aware of that and had agreed to that and that was a fundamental part of the final agreement.

c. *Ratification Hearings: Foreign Relations Committee*

The applicability of Article V to future systems also arose during hearings of the Senate Foreign Relations Committee. On June 29, Senator Buckley testified to the Committee in opposition to the Treaty—an opposition based squarely on the fact that the Treaty was designed to foreclose the possibility of future space-based ABM systems:

> Thus the agreement goes so far as to prohibit the development, test, or deployment of sea, air, or space-based ballistic missile defense systems. This clause, in Article V of the ABM Treaty, would have the effect, for example, of prohibiting the development and testing of a laser-type system based in space which could at least in principle provide an extremely reliable and effective system of defense against ballistic missiles. *The technological possibility has been formally excluded by this agreement.* (Emphasis added.)

An overwhelming majority of Senator Buckley's colleagues disagreed with his judgment about the wisdom of preventing a nationwide ABM system. But neither his colleagues nor the Administration—which naturally wanted Senator Buckley's vote—suggested that he was wrong in asserting that the Treaty was intended to do precisley that. Senator Cooper commented as follows:

> I would like to say that I think Senator Buckley has performed a useful service here today. You have posed practically every question I think that might have been considered by the negotiators. Your paper shows the very thorough knowledge you have of the negotiations and of the systems.

Testifying in retrospect on March 11 this year, then Committee Chairman J.W. Fulbright stated:

> No one at that time, to my recollection, contemplated that systems based on technologies not then in existence would be exempt from the Treaty's ban, under Article V, on development and testing as well as deployment of antimissile systems.

d. Senate Floor Debate

Floor debate and voting on the ABM Treaty occurred on August 3, 1972. Many Senators—for example, Senators Fulbright and Aiken of the Foreign Relations Committee—supported the accords as negotiated. Others, led by Senators Jackson and Allott, expressed concern about what they regarded as inequitable disparities in the accompanying SALT I agreement on offensive arms. Some, including Senator Kennedy, argued that the effort—sanctioned by the ABM Treaty—to erect a defense of the national capital represented the wasteful pursuit of an impossible goal. Two others—Senators Buckley and Allen—opposed the ABM Treaty as an immoral foreclosure of all hope of ever erecting a nationwide defense.

Throughout the debate, however, one thread was unbroken. The Senate understood that the ABM Treaty would codify, and render permanent, a prohibition on building nationwide defenses. No Senator suggested that either country could develop and test space-based lasers or other future technologies. (During the Committee's hearings this year, that unanimity of understanding in the Senate of 1972 was affirmed in a letter signed by more than 20 Senators who participated in the Senate's ABM Treaty deliberations.)

Based upon this common understanding of the Treaty's purpose and content, and with only little dissent as to the Treaty's desirability, the Senate voted in favor of ratification, without reservations or amendments, 88-2.

e. Overview

A complete review of all hearings and floor debate on the ABM Treaty reveals not a single statement by any Administration official or Senator which lends support to the argument that the question of future systems was unresolved or ambiguous.

On occasion, advocates of the "reinterpretation" have tried to invoke certain passages from these proceedings to support their contention that, from the very outset, there was confusion and ambiguity as to whether the Treaty permitted future ABM systems to be developed and tested. To be sure, passages can be found where Executive Branch officials state that the Treaty bars the deployment of future systems—without mentioning development and testing. But no logical inference can be drawn from the omission in such passages of the words "development and testing"—except that the official was speaking accurately. Had the official included the words "development and testing," he would have been incorrect. For the Treaty was designed to *permit* the development and testing of certain future systems—those capable of substituting for fixed land-based systems.

Thus, it is possible to conclude without qualification that nothing in the Senate ratification proceedings offers a scintilla of evidence in support of the "reinterpretation."

D. SUBSEQUENT PRACTICE OF THE PARTIES

The Vienna Convention on the Law of Treaties provides that, in addition to the text of the treaty, "any subsequent practice in the application of the treaty . . . shall be taken into account in interpreting the treaty."

According to testimony to the Committee by Arthur Rovine, a legal expert on subsequent practice, the practice to be examined "would cover the period from the entry into force of the treaty to the date the question of the treaty's meaning was initially raised."

Pursuant to the Senate's approval, the President signed the instruments of ABM Treaty ratification on September 30, 1972; and on October 3 the two superpowers exchanged instruments of ratification, thereby placing the treaty into force. For almost exactly 13 years—until October 6, 1985—neither party publicly questioned the Treaty's meaning with regard to future ABMs.

Three categories of subsequent practice appear relevant to the ABM Treaty:

—U.S. and Soviet conduct under the Treaty;
—Formal exchanges between U.S. and Soviet representatives concerning the meaning of the Treaty;
—U.S. and Soviet statements pertinent to interpretation of the Treaty.

1. Superpower Conduct under the Treaty

Notwithstanding the Administration's "reinterpretation" assertions, the Committee is aware of no U.S. conduct that has violated the ABM Treaty's traditional interpretation by constituting an effort to develop or test a future ABM system or component of a mobile or space-based type. Indeed, a number of U.S. experiments conducted under the rubric of the Strategic Defense Initiative have apparently been carefully structured to conform with the Treaty's long-standing limitations.

Illustrative in this regard is the Secretary of Defense's 1985 *Report to the Congress on the Strategic Defense Initiative*. Outlining three categories of experiments, the report discussed why each category was consistent with the ABM Treaty's traditional interpretation. The report explained why certain directed-energy experiments in space would not violate Article V of the Treaty, and made clear that a number of provisions in the Treaty applied equally to ABM systems using conventional and future technology.

Similarly, the Committee knows of no evidence of Soviet conduct in violation of the traditional interpretation. When asked to comment on Soviet compliance, Administration officials have responded variously. Ambassador Nitze has testified that the Soviet Union has not violated the traditional interpretation. Assistant Secretary of Defense Perle would comment only that Treaty compliance in this regard "is almost hopelessly unverifiable"—a highly questionable assertion given the extensive atmospheric testing required to develop an effective ABM system.

Most significantly, none of the President's classified or unclassified reports on Soviet compliance with the ABM Treaty have asserted, or even suggested, Soviet efforts to develop or test future ABM systems or components in a mobile mode in contravention of the Treaty. Had any such evidence been available, and given the Administration's propensity to publicize potential or probable Soviet treaty violations, the Committee is confident the Administration would have given it a very high silhouette indeed.

2. Formal Exchanges Between the Parties

In the aftermath of the Reagan Administration's initial "reinterpretation" assertions, the Executive Branch yielded to Senate requests for a collection of primary source materials regarding negotiation and implementation of the ABM Treaty. Among these are (a) certain diplomatic exchanges between U.S. and Soviet arms control officials at the SALT II negotiations; and (b) selected proceedings of the Standing Consultative Commission established by the ABM Treaty. The Committee staff has analyzed these materials, some of which remain classified.

Two significant U.S.-Soviet exchanges—one in each category—have been widely publicized, and partially declassified, facilitating their mention here by reference to published accounts.

The SALT II Exchange.—The first occurred in the SALT II negotiations in an exchange between the chief U.S. negotiator, Ambassador Ralph Earle, and his Soviet counterpart, Viktor Karpov, who had previously been a principal ABM Treaty negotiator. The delegations were discussing the possible use of the word "currently" in a provision designed to define multiple independently-targeted reentry vehicles (MIRVs). The U.S. delegation had suggested the use of "currently" in order to incorporate both present and future MIRVs in the definition. According to the previously classified U.S. record of the talks, Karpov responded as follows:

> With respect to the word "currently," . . . the U.S. referred to the ABM Treaty. Such a comparison is not quite justified. The point is that the natures of the ABM Treaty and the new [SALT II] agreement are different. The ABM Treaty is of unlimited duration. The new treaty has a specific defined period of time for its duration. . . . In the ABM Treaty, using "currently" in Article II is quite justified because of the unlimited duration and the Common Understanding [Agreed Statement D]. With the new agreement, the Soviets believe there is no need to use the word "currently," because the duration of the agreement is specifically circumscribed.

Karpov's response shows that he regarded the word "currently" as both significant and appropriate in the definitional clause of a treaty of unlimited duration, as a way of indicating that the definition applied to both present and future systems. Thus, in 1976—four years after the ABM Treaty's ratification—there appeared clear evidence that both parties shared the same understanding of the significance of the word "currently" in Article II of the ABM Treaty, and thus a mutual understanding of the ABM Treaty in its traditional, "narrow" interpretation. Accordingly, the Committee concurs with Senator Nunn that this exchange is a "smoking gun" in favor of the traditional interpretation.

In testimony to the Foreign Relations and Judiciary Committees on April 29, 1987, William Sims, formerly an Attorney Adviser in the office of the State Department Legal Adviser, stated that, in assembling and analyzing documents bearing on the "reinterpretation" issue, he had identified this SALT II exchange as important evidence that the Soviet Union understood and accepted the traditional interpretation. Sims testified further that his superior, Legal Adviser Abraham Sofaer, then proceeded to exclude any mention of Karpov's statement from the analysis through which Sofaer attempted to justify the "reinterpretation," including the Department's August 1986 classified report to the Senate.

The SCC Exchange.—A second relevant U.S.-Soviet exchange—in the Standing Consultative Commission created by SALT I—has also been widely reported. This exchange, between General Richard Ellis and his Soviet counterpart, Lt. General Viktor Starodubov, occurred in May 1985.

According to the September 1987 Arms Control Today, as the two commissioners discussed the restrictions which the ABM Treaty would impose on the Strategic Defense Initiative, Starodubov declared the Soviet side's understanding—just months before the Administration first floated its "reinterpretation"—"that under the treaty ABM systems or components based on other physical principles could not be tested in space."

Summary.—In the category of formal U.S.-Soviet exchanges, the Committee has found no evidence from the pre-October 1985 period of any statement by either party calling into question the ABM Treaty's traditional interpretation. Meanwhile, the two exchanges above offer strong evidence that both sides understood and accepted the traditional interpretation.

3. U.S. and Soviet Statements

a. U.S. Statements

Since the ABM Treaty entered into force in 1972, the U.S. Government has formally and frequently expressed a view as to the Treaty's meaning and the requirements which follow therefrom.

The most comprehensive of these statements in the relevant period—between October 1972 and October 1985—are the yearly Arms Control Impact Statements, issued pursuant to a provision of law requiring the President to assess U.S. obligations under existing treaties and the impact of U.S. weapons programs on U.S. arms control policy. It bears emphasis that, while these statements are prepared under the supervision of ACDA, they are submitted *on behalf of the President* after a rigorous inter-agency process. As such, the annual Arms Control Impact Statements represent the U.S. Government's formal position as to the meaning of arms control treaties.

The first comprehensive Impact Statement was the FY 1979 report, which clearly affirmed the traditional interpretation of the ABM Treaty in the context of discussing directed-energy weapons. With respect to particle beam weapons (PBWs), that report stated:

> PBWs used for BMD [ballistic missile defense] which are fixed land-based could be developed and tested but not deployed without amendment of the ABM Treaty, and the development, testing and deployment of such systems which are other than fixed land-based is prohibited by Article V of the Treaty.

Over the next five years (FY 1980-84), the annual Arms Control Impact Statements all clearly and unambiguously reiterated the

ABM Treaty's traditional interpretation, explicitly confirming that Article V applies to both present and future ABM systems.

The FY 1985 statement was perhaps clearest of all, stating that the "ABM Treaty prohibition on development, testing and deployment of space-based ABM systems, or components for such systems, applies to directed-energy technologies (or any other technology) used for this purpose."

The Committee is aware of no U.S. Government statement during the relevant period which contradicts, or even casts doubt on, the ABM Treaty's traditional meaning. Certainly, many statements may be found which are consistent with both the traditional interpretation and the "reinterpretation," just as it is possible to find such statements in the ratification proceedings. But such statements neither confirm nor refute either interpretation, and have no probative value.

The Committee finds that, in the absence of conflicting evidence, the series of official U.S. Arms Control Impact Statements from FY 1979 to FY 1985 serve as an irrefutable and sufficient demonstration that from the Treaty's entry into force until October 1985 the United States deemed itself bound by the traditional interpretation.

b. Soviet Statements

Unlike the United States, the Soviet Government does not regularly publish details as to its military programs or its compliance with arms control agreements. Consequently, the Committee is aware of no official Soviet reports which address the meaning of the ABM Treaty. Published articles by senior Soviet officials do, however, appear in the Soviet press, and are widely accepted as expressions of official Kremlin policy.

The first statement the Committee has been able to identify directly addressing the interpretation issue came from Colonel General Nikolai Chervov, head of the General Staff directorate charged with arms control matters. In an April 29, 1983, interview in Bratislava Pravda—shortly after President Reagan's famous "Star Wars" speech but more than two years before the "reinterpretation"—Chervov stated that SDI was "completely inconsistent" with the commitments of the ABM Treaty, in particular Article V(I), which he cited in full. Chervov said the treaty "bans both sides from developing antiballistic missile defense based on new physical principles—lasers, microwave radiation, beam weapons, and so forth." Thus, the Soviets were arguing against any "reinterpretation" of the ABM Treaty well before one emerged.

Another official Soviet statement—by Marshall Sergei Akhromeyev, Chief of the Soviet General Staff—was even more explicit. In an article published in Pravda on June 4, 1985, four months before the "reinterpretation" was announced, Akhromeyev wrote as follows:

> The provisions of the treaty apply to any systems intended, as defined in Article II of the Treaty, to counter strategic ballistic missiles or their elements in flight trajectory. Since the ABM components being created within the framework of the Strategic Defense Initiative are intended

> for precisely this purpose—that is, they are designed to replace the interceptor missiles mentioned in the treaty—all the provisions of the treaty fully apply to them, above all the ban on the creation, testing, and deployment of space-based ABM systems or components.

Akhromeyev's statement applies a functional definition of Article II, which is the heart of the traditional interpretation, and reaffirms that Article V's prohibitions apply to new technologies which could replace interceptor missiles.

Finally, in a written response to questions asked by Time magazine reporters in early September 1985 (only one month before the "reinterpretation" emerged), General Secretary Gorbachev criticized the SDI as "the first stage of the project to develop a new ABM system prohibited under the treaty of 1972." While Gorbachev's comment is general, it is directed at either or both of the following: the announced Reagan intent to develop a nationwide ABM system, or the effort to develop ABM systems using new technology. In any event, the statement represents an affirmation of the fundamentals of the ABM Treaty by the highest Soviet official—before the "reinterpretation" issue was raised.

c. *Summary*

In sum, the record of the "subsequent practice" of the parties—reflected in U.S. and Soviet conduct under the ABM Treaty regime, in formal diplomatic exchanges, and in official public statements—provides overwhelming evidence that the parties jointly adhered to the interpretation of the Treaty articulated by U.S. negotiators in 1972 and understood by the U.S. Senate when it consented to ratification. In the Committee's judgment, the evidence demonstrates conclusively that from the ABM Treaty's entry into force until October 1985 the United States and the Soviet Union understood their legal obligations in accord with the traditional interpretation of the Treaty.

III. The "Reagan Revision" of the ABM Treaty

President Reagan's famous "Star Wars" speech of March 1983 by all accounts caught the Reagan Pentagon, including Secretary of Defense Weinberger, by surprise. The President's notion—of building an anti-nuclear technological astrodome over the United States—was deemed feasible by few scientists and ran totally counter to basic strategic concepts, widely accepted throughout the Atlantic Alliance, and counter also to U.S. obligations embodied in the ABM Treaty, the foundation-stone of nuclear arms control. In the ensuing months, however, the Administration came into line with the President, as existing programs of ABM-related research were aggregated under the rubric of the "Strategic Defense Initiative," and sharply expanded appropriations were requested of Congress.

A. GENESIS OF THE "REINTERPRETATION"

In late 1984, as part of a DOD effort to determine the precise constraints imposed on the SDI by the ABM Treaty, then Deputy Undersecretary of Defense T.K. Jones commissioned two studies on

Treaty interpretation. The first, an unclassified analysis by William Harris of the Rand Corporation, a principal author of the "Additional Views" in this report concluded that the United States should adopt a new, broader interpretation of the ABM Treaty. The second was a classified study completed in March 1985 by two veteran arms control negotiators, Sidney Graybeal and Colonel Charles Fitzgerald, both of Systems Planning Corporation. In analyzing what research might legally be pursued, the Graybeal/Fitzgerald study presented overwhelming evidence in favor of the traditional interpretation of the ABM Treaty.

In April 1985, the Heritage Foundation released a "backgrounder" analysis, arguing for a new interpretation of the ABM Treaty that would permit development, testing, and deployment of space-based and other mobile-type ABM systems using future technology. While the paper was written by someone within the Administration "who requests anonymity," the Committee has learned that the paper was prepared by Bretton Sciaroni, counsel to the President's Intelligence Oversight Board. (Two years later, Mr. Sciaroni was to make another contribution of note by presenting, in testimony to the joint Iran/Contra committee, his legal opinion that the National Security Council was exempt from the key restrictions of the Boland Amendment limiting aid to the Nicaraguan Contras.)

In May 1985, speaking at the Johns Hopkins School of Advanced International Studies, the President's Special Adviser on Arms Control, Paul Nitze, presented the Administration's case for the SDI and discussed its impact on the ABM Treaty. Nitze's speech stands as a clear exposition of the traditional interpretation of the Treaty. It represents the last public statement by the Administration espousing the traditional interpretation.

In the summer of 1985, Undersecretary of Defense for Policy Fred Ikle and Assistant Secretary of Defense Richard Perle hired Philip Kunsberg, a former New York assistant attorney, as a Pentagon staff lawyer. One of Kunsberg's first tasks was to gauge the impact of the ABM Treaty on the SDI program. In September, Kunsberg submitted a report to Perle which argued that the "negotiating record" of the Treaty could be used to rationalize a new interpretation of the ABM Treaty that would permit development, testing, and *deployment* of space-based ABMs based on future technologies.

On September 17, 1985, the Administration's SDI inter-agency group met to resolve how the Administration would respond to an inquiry from Senator Levin concerning Treaty-imposed limits on the SDI program. At that meeting, Perle and other DOD officials reportedly accepted the State Department view which effectively upheld the traditional interpretation (the issue of a "narrow" vs. "broad" interpretation having not yet expressly arisen). After Ambassador Nitze had departed that meeting, however, Perle is reported to have introduced Kunsberg's new interpretation as the DOD position.

Soon thereafter this startling DOD position was made known to the State Department; and Secretary of State Shultz instructed Legal Adviser Abraham Sofaer—who, like Kunsberg, was new to the Administration—to review Kunsberg's report. But no change in policy had yet emerged. In the days thereafter, the Arms Control and Disarmament Agency circulated a paper prepared by Nitze that reflected the traditional view; and the Defense Department formally responded to Senator Levin's inquiry with an answer that reflected the traditional interpretation.

At the end of September 1985, during Sofaer's study of the "negotiating record" and other documents, William J. Sims, an Attorney Adviser on the Sofaer staff, analyzed the U.S. record of the SALT II Karpov-Earle exchange concerning the use of the word "currently" in the ABM Treaty. (That exchange is described in this report under the subsection entitled "Subsequent Practice of the Parties.") Convinced that this document confirmed Soviet understanding and acceptance of the traditional interpretation, Sims brought the exchange to Sofaer's attention.

Nonetheless, on October 3, Sofaer delivered to Shultz and Nitze a memo which concluded that the ABM Treaty should be "reinterpreted" to allow the development and testing, but not the deployment, of future space-based ABMs. Arguing principally from the "negotiating record," Sofaer's October 3rd memorandum omitted any mention of the critical SALT II exchange that Sims had brought to Sofaer's attention.

The following day, the ABM issue was considered at a meeting of top officials from DOD, ACDA, the State Department, and the NSC. The Pentagon representatives accepted Sofaer's interpretation of the ABM Treaty and abandoned Kunsberg's. But apparently no agreement was reached as to whether Sofaer's position should be transformed into Administration policy. At the meeting's end, National Security Adviser Robert McFarlane asked the various agencies for further comments in writing.

Given the unresolved status of this issue within the Administration, much surprise greeted McFarlane's statement—only two days later on "Meet the Press"—announcing a new "broad" interpretation of the ABM Treaty. Under the new interpretation, testing and development of space-based ABM systems and components using "exotic" technologies would be permitted. That week, McFarlane gave a background briefing reaffirming the Administration's commitment to the new interpretation.

During the resulting furor, the Reagan Administration received letters from British Prime Minister Thatcher and West German Chancellor Kohl criticizing the new interpretation. On October 11, President Reagan convened a meeting of the National Security Policy Group (NSPG) to discuss the issue with Secretaries Shultz and Weinberger, ACDA Director Kenneth Adelman, McFarlane and others. Following that meeting, the President signed National Security Decision Directive 192, outlining the Administration's new position on the meaning of the ABM Treaty. This new position was announced on October 14 by Secretary Shultz, who stated that the President had decided that while the new interpretation "is fully justified . . . [SDI] will continue to be conducted in accordance with a restrictive interpretation of the Treaty's obligations."

According to Sims, in testimony to the Foreign Relations and Judiciary Committees on April 29 of this year, "Immediately prior to the October 11th NSPG was the first time a dissenting view reached all the principles" in the form of a one and a half page

ACDA memo and "that memorandum was the first time that one of the arms of Government provided a dissenting view to all the principles in the interagency process." For example, the Pentagon's Graybeal/Fitzgerald study was apparently withheld from Nitze and other officials until after the President's decision.

With regard to the Administration's decision-making process, Sims testified further that "None of the individuals directly involved were career civil servants—the career attorneys who had the knowledge and experience. . . . The upshot was that the experts were left out of the process, and as a result I feel that the procedure was flawed, resulting in conclusions that were inaccurate." In summary, he said, "the process that we followed was not sufficient, so that we did not allow our President an objective assessment of the ABM Treaty. We provided him what I think was a flawed decision memorandum."

The Committee concludes that such haste and bias can only be explained by an ideological motivation on the part of certain Administration officials to circumvent dispassionate analysis of solemn U.S. treaty obligations and to subordinate such obligations to their own policy preferences.

B. COMMENCEMENT OF THE "REINTERPRETATION" DEBATE

In October and November 1985, following McFarlane's surprise announcement, Legal Adviser Sofaer and Ambassador Nitze provided the initial justification in testimony before the House Foreign Affairs Committee and the Senate Armed Services Committee. Sofaer testified that the text of the ABM Treaty was "ambiguous" and that the secret negotiating record revealed a Soviet refusal to accept limits on future ABM systems in the body of the Treaty. Sofaer asserted that only Agreed Statement D placed limitations on future ABM systems and that the Agreed Statement only limited deployment of such systems. Moreover, Sofaer claimed, the U.S. ratification record and the "subsequent practice" of the parties were consistent with the "reinterpretation."

Such assertions were greeted with considerable skepticism from members of both committees. Two problems faced congressional skeptics: to counter an unprecedented argument that justified distorting a treaty on the basis of a "negotiating record"; and to do so without access to that body of documents. While fundamentally flawed, the Administration approach had laid down an effective, if temporary, veil of obfuscation.

Like Congress, the Soviet Union had not been consulted before the "reinterpretation" announcement, notwithstanding that Article XIII of the ABM Treaty established the SCC to "consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous." The Soviet view, however, was quickly voiced. On October 19, the Chief of the Soviet General Staff, Marshall Akhromeyev, publicly derided the Administration's action as a "deliberate deceit. . . . Article V of the Treaty absolutely unambiguously bans the development, testing, and deployment of ABM systems or components of space or mobile land basing . . . regardless of whether these systems are based on existing or 'future' technologies."

In May 1986 the Reagan Administration released its FY 1987 Arms Control Impact Statement, which declared that the Administration would adhere to the traditional interpretation of the ABM Treaty "as long as the [SDI] program receives the support necessary to implement its plan"—a paradoxical position which essentially stated that the Administration would not violate the ABM Treaty if provided the funding necessary to move promptly toward the Treaty's violation or abrogation.

Clear evidence that the "reinterpretation" was no longer theoretical came in the summer of 1986, when the Administration altered its negotiating position in Geneva, informing the Soviet delegation that it would accept no limitations on the development or testing of ABM systems based on future technologies.

Meanwhile, following repeated efforts by Senators to examine the ABM Treaty's still-secret "negotiating record," Senator Nunn sharply criticized the Administration's refusal to provide access. While the revision was "supposedly based on the negotiating record, Senator Nunn said, "the Senate has no access to the record and therefore no way to judge the soundness of the Administration's position."

Finally, on August 6, 1986, in letters to Senators Lugar and Pell, Secretary Shultz authorized Senate access to the Graybeal/Fitzgerald study and that portion of the Sofaer analysis which evaluated the negotiating record. In December, following a review of these materials, Senator Levin wrote a detailed critique of the Sofaer paper, concluding that "Judge Sofaer's interpretation of the [ABM] Treaty is incorrect, and that the process he used to develop and justify that interpretation was fatally flawed."

In January 1987, Secretary of Defense Weinberger began to advocate the possibility of an early deployment of systems developed under the SDI. Implicit in such a decision was a move to full-scale development and testing of ABM systems under the "reinterpretation." In February, Secretary Shultz testified that the Administration was discussing "whether we should restructure the SDI program in accordance with the broad interpretation of the ABM Treaty." According to press reports, President Reagan was inclined to favor such a restructuring.

In anticipation of a presidential decision, Senator Nunn wrote to the President on February 6, warning that "a unilateral executive branch decision to disregard" the traditional interpretation of the ABM Treaty "would provoke a Constitutional confrontation of profound dimensions." In mid-February, the President signed National Security Decision Directive 261, which reportedly affirmed the validity of the "reinterpretation"; instructed the State Department to complete a study on the ratification proceedings and "subsequent practice" of the Treaty; and directed the Defense Department to complete a study of what SDI tests could be profitably conducted under the broad interpretation.

C. THE SOFAER DEFENSE

Since October 1985, the task of defending the "reinterpretation" has fallen primarily to one of its initial authors—indeed, the official without whom the "reinterpretation" could not have been translated into administration policy: Legal Adviser Sofaer. During that period, Mr. Sofaer has repeatedly revised his explanation as each new argument proved unsound.

Of particular significance was Sofaer's treatment of the ratification proceedings, an analysis of which Sofaer provided to Congress during his 1985 testimony. By the time of his appearance before the Foreign Relations and Judiciary Committees on March 26th of this year, Sofaer was compelled to admit that his original analysis "did not provide a complete portrayal of the ratification proceedings"—certainly a euphemism given the grossly misleading character of his first presentation. Mr. Sofaer's explanation—that he "did not review this material personally" and his attribution of the mistakes to "young lawyers" on his staff—must be evaluated in light of the subsequent testimony of one of those lawyers, William Sims, who resigned in protest against Sofaer's selective use of documentation.

In fact, a distorted characterization on the ratification proceedings was simply symbolic of a larger distortion—of legal integrity. As Mr. Sofaer himself now admits, no comprehensive study of the ratification proceedings and "subsequent practice" was performed by anyone prior to the President's decision on October 11, 1985, to adopt the "reinterpretation" as Administration policy. Yet both are crucially important. As this report will discuss, ratification proceedings are crucial to constitutional law and significant also in international law. And "subsequent practice" is regarded under international law as a key factor, along with the text of a treaty, on questions of interpretation. The Administration was proceeding not on the basis of genuine legal analysis but from a policy compulsion that sought no more than a legal veneer.

Not until September 1987—after two years of heavy criticism—did the Administration complete its full "study" of the legal issues involved in the "reinterpretation." What began as an expediently contrived rationale has now been formalized in three Administration documents—on "Treaty Language and Negotiating History" (May 11, 1987); "Ratification Process" (May 11, 1987); and "Subsequent Practice" (September 9, 1987)—prepared under Mr. Sofaer's direction. While these "studies" have eliminated the glaring distortions that characterized the Administration's initial rationalizations for the "reinterpretation," the Committee remains no more convinced by Mr. Sofaer's argumentation.

The following is a brief discussion of Mr. Sofaer's most recent arguments:

1. Text of the Treaty

Assertion.—Mr. Sofaer argues that the text of the Treaty is ambiguous. He claims that, since both the traditional and his "broad" interpretation are plausible, the ABM Treaty can reasonably be read to provide for the "reinterpretation."

The crucial premise of this argument is the assertion that the definition of an ABM system in Article II can be read to include only then-existing ABM components: ABM interceptor missiles, ABM launchers, and ABM radars. Once this definitional assumption is made, the "reinterpretation" structure is easily built: The

Treaty's prohibitions and limitations then apply only to existing—and not to future—technology.

The Sofaer argument makes much of the fact that Agreed Statement D is the only part of the Treaty which explicitly refers to ABM systems "based on other physical principles," claiming that Agreed Statement D is therefore the only limit on such future systems. Since Agreed Statement D provides that the parties will deploy systems based on future technologies only after agreeing to do so, Sofaer argues that development and testing of future systems is totally unconstrained by the Treaty.

Rebuttal.—The ABM Treaty is far from ambiguous because the Treaty's express purpose—of preventing the erection of nationwide ABM defenses or the preparation of the base for such a defense—is supported perfectly by the Treaty's all-encompassing definition of an ABM system. Article II defines an ABM system as a "system to counter strategic ballistic missiles in flight trajectory." Thus, any weapon functionally able "to counter strategic ballistic missiles" is an ABM system.

Article II does not define an ABM system as *consisting* of ABM interceptor missiles, ABM launchers, and ABM radars. It states that ABM systems "currently" consist of those components. The word "currently" would have no purpose were the Treaty seeking to limit the definition of an ABM system solely to then-existing systems.

When the definitional question is freed from the Sofaer obfuscation, the Treaty's ban on both present and future ABM components becomes crystalline clear. Thus, when Article V prohibits the development, testing, and deployment of all space-based and other mobile ABM systems, that ban applies to systems embodying both "current" and future technology.

Meanwhile, Agreed Statement D does not serve the function, ascribed to it by Mr. Sofaer, of preventing the deployment of future ABM systems. Such a major function would hardly be appropriate for an appended agreement of understanding. Instead, Agreed Statement D serves the more appropriate function of reaffirming the meaning of Article III—that the two sides will deploy only those fixed land-based systems permitted in Article III—and the intent of the two sides to negotiate further if developments in ABM technology appear to warrant the deployment of future fixed land-based systems not permitted by Article III. In no way does Agreed Statement D alter the Treaty's categorical ban, in Article V, on present and future mobile ABMs. (A fuller discussion of the text of the ABM Treaty is contained in the subsection of this report entitled "Textual Analysis.")

2. The Negotiating Record

Mr. Sofaer's assertion that the "negotiating record" supports the broad interpretation relies on four key assertions. According to the May 11 report:

(i) When Article V(1) was completed in September, 1971, the Soviet delegation did not agree that the broad ban on mobile ABMs would apply to future ABM systems;

(ii) When Article II was completed in December 1971, the Soviet delegation did not believe the definition of an ABM system would include future ABMs because "the U.S. negotiators assured them that the futures problem would be settled elsewhere than in Article II(1);"

(iii) The Soviet delegation refused "to regulate in the Treaty itself and in Article II(1) as fully written, any ABM system other than the ones currently consisting of ABM missiles, launchers, and radars;" and

(iv) Throughout the negotiations, "the Soviets opposed, as a matter of principle, any attempt to regulate unknown systems or components." And Agreed Statement D is the only provision in which the Soviet Union agreed to limitations on future ABM systems and components.

(i) First Assertion and Rebuttal.—Mr. Sofaer's first assertion relates to Article V, which reads: "Each party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." The negotiating record reveals that on September 15, 1971, Viktor Karpov, the Soviet delegate assigned by his delegation to negotiate this article, expressed a binding commitment that the Soviet interpretation of the words "ABM components" would apply to "any type of present or future components" of ABM systems.

According to the Sofaer analysis, when Karpov made this statement he was not referring to future ABMs based on new technology but only to future versions of ABMs based on existing technology. But the Legal Adviser's report provides no direct evidence of this distinction—not a single explicit Soviet statement that Article V's restrictions would apply only to future versions of ABMs based on existing technology but not to ABM systems based on new technology. Moreover, when Karpov's U.S. counterpart, Sidney Graybeal, explained the application of Article V in early September, he said it would apply to "improvements of existing ABM systems" and to "future systems."

The Sofaer report argues that "Had the Soviets agreed to prohibit development, testing, and development of all future, unknown mobile 'devices' that could replace known systems or components, they should have been far more accommodating in accepting" the U.S. proposal to ban future fixed land-based ABMs. Instead, Sofaer claims, the Soviet opposition to banning future fixed land-based ABMs "continued unabated."

But this entire form of argument is thoroughly illogical. Clearly, the Soviets were interested in discussing further the question of future fixed land-based systems. Indeed, when the September 15 agreement was reached on mobile ABMs, the brackets around the Treaty's provision on mobile ABMs were removed while the brackets around the provision governing future fixed land-based ABMs remained. But this separation was totally sensible and implies nothing about Soviet views on banning mobile ABMs. The question of fixed land-based ABMs, which the Treaty explicitly permitted, was totally distinct from the question of limits on mobile ABMs. The "negotiating record" contains no suggestion that the Soviet side ever changed its position on banning mobile ABMs—both present and future.

(ii) Second Assertion and Rebuttal.—Mr. Sofaer's second assertion is that Article II does not include future systems in its defini-

tion because the U.S. side assured the Soviets during the negotiations that the language of Article II would "not prejudice" either party's position on limiting future ABMs. This assurance was indeed given, but does not serve as evidence for Mr. Sofaer's claim. The U.S. side was simply stating a truism: that Article II would be definitional only and that limits on systems would be imposed by other Treaty articles.

(iii) Third Assertion and Rebuttal.—A third Sofaer assertion—sweeping in significance—is that the Soviet Union simply refused to regulate future ABMs in Article II or anywhere else in the Treaty. But the "negotiating record" directly refutes this assertion. As the final language of Article II was completed in late December 1971, members of the U.S. delegation proposed inserting the word "currently" into the proposed text, specifically explaining that the word was inserted to make clear that both present and future ABMs would be covered under a functional definition of an ABM system. In agreeing to this insertion on December 21, the Soviet side specifically referred to the significance of the word "currently," explicitly demonstrating Soviet understanding that Article II—and therefore the whole Treaty—would impose limits on present and future ABM systems. Indeed, at one point in his analysis, Mr. Sofaer concedes that Article II(1) is functional—a concession which does much to devastate his entire argument for the "reinterpretation."

Fourth Assertion and Rebuttal.—Finally, Mr. Sofaer claims that only Agreed Statement D places limitations on future ABMs of any basing mode. Yet this contention is directly refuted by a passage in Sofaer's own report which states:

> Discussions during the negotiation of Agreed Statement D, and thereafter during the final drafting of Article III's introductory language, indicate that the parties believed that Articles I, II, and III together expressed their intention to bar deployment of all OPP devices [future ABMs].

Sofaer's acknowledgment—that both delegations agreed that the body of the Treaty, not Agreed Statement D, imposed limits on future ABMs—not only refutes the fourth assertion but directly contradicts his entire case for the "reinterpretation." Since Articles I and III impose deployment limits in terms of "ABM systems" and Article II defines those systems, if these articles together ban deployment of future systems, then the definition in Article II must include future ABMs.

Summary.—In sum, none of the critical assertions in the Legal Adviser's May 11 report is justified by the "negotiating record." On the contrary, U.S. memoranda recording the progress of the negotiation serve to demonstrate very clearly that the two delegations understood, and agreed to, the traditional interpretation—and drafted the Treaty text accordingly.

The Committee notes that Mr. Sofaer's analysis of the "negotiating record"—issued more than 18 months after the "reinterpretation" was announced—continues to contain critical omissions and numerous misrepresentations. These deficiencies, of course, were inevitable—for the report constitutes a deliberate attempt to rewrite history.

3. The Ratification Record

The final Sofaer report on ratification proceedings finds "no basis in the ratification record for requiring the Administration to revise its position that the Soviets refused to bind themselves during the negotiations to the narrow interpretation of the ABM Treaty." Moreover, with respect to domestic U.S. law, Mr. Sofaer asserts that "the ratification record likewise provides no basis for a conclusion that the President is bound to the [traditional] view as a matter of law."

The essence of Mr. Sofaer's argument is that the ratification record:

(a) shows that Executive Branch witnesses made inconsistent statements (the Nixon Administration "may not have had a clear and uniform view on this issue, and in any event, its representatives failed to communicate a clear and consistent view to the Senate"); and

(b) "fails to establish that the Senate's consent to ratification was based on a generally held understanding of the Senate that the Treaty prohibits the development and testing of [future ABMs]."

As regards the Nixon Administration's representations to the Senate, the Sofaer report itself states as follows:

> The record contains Executive representations to the Senate which support the restrictive interpretation, which were apparently cleared in the government by NSC staff, and upon which Senators could justifiably have relied in granting advice and consent.

Indeed, throughout the ratification proceedings, Executive Branch officials consistently represented the treaty as banning development, testing and deployment of mobile ABMs using future technology. The Secretary of State's formal *Letter of Submittal* embodied the traditional interpretation, emphasizing the functional definition of Article II. A formal submission by the Secretary of Defense represented the traditional interpretation to the Senate Armed Services Committee. The traditional interpretation was reaffirmed to that Committee by senior representatives of the Joint Chiefs of Staff and other top DOD officials. And when Senator Buckley testified to the Senate Foreign Relations Committee that he opposed the Treaty because it banned development and testing of space-based laser ABMs, the Executive Branch made no effort to dispute or correct Senator Buckley's interpretation.

Indeed, Mr. Sofaer's claim that Executive Branch representations were inconsistent is simply unsupportable. Sofaer himself admits some Executive representations established the narrow interpretation. But he fails to identify one single example of an Executive Branch representation which explicitly rejects the traditional interpretation. There can be no inconsistency if only the traditional view was explicitly stated. The Sofaer "inconsistency" argument is pure sophistry.

As to the Senate's understanding, Mr. Sofaer's report admits that certain answers by Executive Branch officials, "particularly those by DOD and JCS officials reasonably led the few Senators who focused clearly on this issue to conclude that the Treaty precludes the development and testing of space-based lasers." Indeed, as Section II(C) of this report makes clear, several key Senators, including Jackson and Goldwater, were involved in specific exchanges with Administration representatives which demonstrate very clearly the Senators' understanding of the traditional meaning.

The Committee is aware of no instance, throughout the ratification proceedings, wherein a Senator or Executive Branch representative made any statement inconsistent with the traditional interpretation.

As Professor Henkin stated, during hearings this year, "where several statements are made and there is general acceptance of their tenor, that is the Senate understanding. That is true in the case of Senate consent to a treaty, as it would be in the legislative History of a statute." The ratification debate on the ABM Treaty fulfills Henkin's description. On numerous occasions, several Senators clearly stated their understanding as being the traditional interpretation, and there was general acceptance of these Senators' views. Accordingly, the committee has no hesitation in asserting without qualification that the Senate understood the traditional interpretation of the ABM Treaty when it gave its advice and consent to ratification in 1972. Mr. Sofaer's claim that there was no general understanding is simply false.

Finally, as to the Legal Adviser's analysis of treaty-making, the committee finds his assertion that the President is not bound by the Senate's understanding to be not only thoroughly unpersuasive constitutionally but also potentially devastating to the ability of the United States to make new international treaties. Section VI of this report contains a full discussion of the Legal Adviser's theories.

4. Subsequent Practice

In his September 1987 report, the Legal Adviser concludes that "subsequent practice" under the ABM Treaty has not resulted in either an international or a domestic legal requirement for the United States to uphold the traditional interpretation.

Throughout the report, Mr. Sofaer attempts to show that doubt existed within the U.S. Government about this issue from 1972 to 1985. And certainly, as the Sofaer report demonstrates, on several occasions in the 1972–85 period the U.S. Government looked at the issue. But time and again, the executive branch determined that the traditional interpretation was correct and at no time raised the issue with the Soviets. The report itself admits that "the U.S. position in bilateral discussions [with the Soviet Union] appears to have been consistent with the restrictive interpretation throughout the period 1973 to 1985."

This is a crucial statement. Mr. Sofaer seeks to minimize its significance by the assertion that disagreement existed within the U.S. Government regarding the proper interpretation—a debatable assertion in itself. But in any case Mr. Sofaer himself admits that "the internal doubts expressed about the restrictive interpretation are in themselves entitled to little weight under international law."

Of even greater significance is this acknowledgment in the Sofaer report:

> Actions taken by the U.S. in the SDI program through October 1985 were consistent with the restrictive interpretation. During this period, the U.S. stated that its development and testing activities had been designed to be consistent with that interpretation.

Thus, the report admits that for nearly five years—and for more than two years after the President's Star Wars initiative—the U.S. Government, even under President Reagan, still actively adhered to the traditional interpretation. In short, the Reagan Administration itself acted to reaffirm the obligations of the United States in the context of "subsequent practice."

As to Soviet "subsequent practice," the report can identify no instance of conduct in violation of the traditional interpretation. Acknowledging that conduct is more important than statements, the report admits that "No convincing evidence exists . . . that the Soviets have advanced to the development stage with mobile [future] ABM systems."

The report then seeks to dismiss the significance of this crucial fact by implying that such research activity may be unverifiable. Yet the lack of even a mention of the "possibility" of such activity in the Reagan Administration's annual arms control compliance reports to Congress indicates that the Legal Adviser has groped for an argument. The Reagan Administration has not hesitated in the past to charge the Soviets with a series of probable or even possible arms control violations.

Able to adduce no evidence of Soviet *conduct* in violation of the traditional interpretation, the Legal Adviser is reduced to citing a number of Soviet statements, which allegedly suggest Soviet adherence to a "broad" interpretation. Yet, because Mr. Sofaer rejects many Soviet statements supporting the traditional view on the grounds that they were incorrect in some other way, he cannot validly use only those which may tend to support his view. At one point his report admits as much: "the fact that these untenable positions were advanced *makes questionable as evidence of subsequent practice all other Soviet assertions on the treaty's meaning.*" (Emphasis added.)

Finally, and perhaps most important, the study can provide no example of a Soviet statement—or a U.S. statement before October 1985—which clearly expresses the broad interpretation. The Sofaer report thus provides no evidence, even on a declaratory level, that either U.S. or Soviet "subsequent practice" supports any change from the traditional interpretation. On the other hand, a number of U.S. and Soviet statements in the report express clear and explicit support for the traditional interpretation.

In sum, the admissions in the Sofaer report itself serve to demonstrate that his study proves nothing of any legal value. On the Soviet side, he discredits the legal value of Soviet statements, asserts that conduct is more important than statements, and then finds no Soviet conduct known to have exceeded the traditional interpretation. On the U.S. side, he admits that until October 1985 both U.S. statements and U.S. conduct were unequivocally in conformity with the traditional interpretation. The upshot of these facts is plain and powerful: "subsequent practice" under the ABM Treaty provides strong support for the traditional interpretation.

IV. COMMITTEE ACTION

On March 12, 1987, Senator Biden introduced S. Res. 167, the "ABM Treaty Interpretation Resolution."

Acting jointly with the Judiciary Committee, the Foreign Relations Committee held three days of hearings on S. Res. 167. Witnesses were as follows:

MARCH 11, 1987

I. Treaty Negotiators.—(1) Lt. Gen. Royal Allison (USAF-Ret.), Member, ABM Treaty Negotiating Delegation; and (2) The Honorable Raymond Garthoff, Executive Secretary and Senior Adviser to the ABM Treaty Negotiating Delegation.

II. Senate Foreign Relations Committee Chairman in 1972.—The Honorable J.W. Fulbright.

III. Current Senators.—(1) Senator Sam Nunn (D-Ga.); and (2) Senator Pete Wilson (R-Calif.).

IV. Constitutional Scholars.—(1) Professor Laurence Tribe, Tyler Professor of Constitutional Law, Harvard University; (2) Professor Gordon Brewster Baldwin, Constitutional and International Law, University of Wisconsin; and (3) Professor Louis Henkin, University Professor, Columbia University.

MARCH 26, 1987

I. Current Senator.—Senator Ernest Hollings (D-S.C.).

II. Current Administration Officials.—(1) The Honorable Abraham D. Sofaer, Legal Adviser, Department of State; and (2) The Honorable Richard Perle, Assistant Secretary for International Security Policy, Department of Defense.

III. Treaty Negotiators and Legal Experts.—(1) The Honorable Gerard C. Smith, Head, ABM Treaty Negotiating Delegation; (2) The Honorable John Rhinelander, Legal Adviser, ABM Treaty Negotiating Delegation; and (3) The Honorable Abram Chayes, former Legal Adviser, Department of State; current Felix Frankfurter Professor of Law, Harvard University.

APRIL 29, 1987

I. Legal Experts.—(1) The Honorable Antonia Chayes, former Under Secretary of the Air Force; (2) The Honorable Leonard C. Meeker, former Legal Adviser, Department of State; and (3) Arthur W. Rovine, Esquire, former Assistant Legal Adviser for Treaty Affairs, Department of State.

II. Experts on Interpretation of the ABM Treaty.—(1) Mr. Sidney N. Graybeal, Member, ABM Treaty Negotiating Delegation, current Vice President of the Center for Strategic Policy, Systems Planning Corporation; and (2) William J. Sims III, Esquire, former Attorney Adviser, Office of the State Department Legal Adviser.

Also invited to testify at the April 29 hearing were Thomas Graham, Jr., General Counsel of the U.S. Arms Control and Disarmament Agency; and John H. McNeill, Assistant General Counsel (International and Intelligence), Department of Defense. Both officilas—each known to have argued within the Reagan Administration that the traditional interpretation is legally correct—failed to appear, apparently having been so directed.

In shaping S. Res. 167, the Committee relied heavily on the counsel of Professor Louis Henkin of the Columbia Law School, who supervised the recent revision of the American Law Institute's *Restatement of the Law, Foreign Relations Law (Revised);* Professor Laurence H. Tribe of the Harvard Law School, author of *American Constitutional Law;* and Professor Abram Chayes of the Harvard Law School, the State Department Legal Adviser under President John F. Kennedy. In addition, the Committee retained as a consultant its former Legal Counsel, Professor Michael Glennon of the University of California, Davis, Law School and co-author of "United States Foreign Relations and National Security Law." The language of S. Res. 167, as reported by the Committee, resulted from extended consultation with these experts, all of whom have endorsed the principles set forth therein. For factual and analytic background on the ABM Treaty, the Committee also benefited from consultation with James P. Rubin, research director for the Arms Control Association.

On May 19, 1987, the committee met to mark-up S. Res. 167 and adopted, by unanimous consent, minor modifications proposed by Senator Biden. A Helms amendment, in the nature of a substitute, was defeated by a vote of 9-10. Voting in favor were Senators Helms, Lugar, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans and McConnell. Voting against were Senators Pell, Biden, Sarbarnes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, and Moynihan. The Committee then voted 11-8 to report S. Res. 167 with a favorable recommendation. Voting in favor were Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, and Kassebaum. Voting against were Senators Helms, Lugar, Boschwitz, Pressler, Murkowski, Trible, Evans, and McConnell.

V. S. RES. 167: SECTION-BY-SECTION ANALYSIS

SECTION 1: SHORT TITLE

The first section sets forth the short title, the "ABM Treaty Interpretation Resolution."

SECTION 2: THE TREATY POWER

Section 2 identifies principles governing the interpretation of treaties under United States constitutional law. The Committee wishes to emphasize that these are *constitutional* principles, because much confusion has derived from the overlapping application of principles of international and constitutional law. Although to some extent each legal system—constitutional and international—incorporates subject matter of the other, analysis is usually better advanced by viewing the two systems as separate and distinct.

The provisions of this section thus pertain only to the United States' domestic constitutional system. S. Res. 167 is intended to identify constitutional precepts that govern the Congress, the courts, and the Executive in determining the meaning of a treaty. In a dispute over treaty interpretation the judiciary, of course, must perform as the ultimate arbiter; nothing herein should be construed as derogating from the courts' role under Article III of the Constitution to say what the law is. Indeed, the Committee hopes that the provisions of this section, by helping to remove impediments to adjudication, will facilitate the resolution of disputes concerning the meaning of treaties.

The Committee believes that such disputes present a legal question which clearly admits of the possibility of judicial resolution, and that a member of the Senate incurs concrete and personal injury when the Executive violates the provisions of a treaty. A Senator's vote is nullified if the President ignores the Senate's will as expressed in a treaty's resolution of ratification.

Section 2: Paragraph (1)

Subparagraph (A) restates the Constitution's Treaty Clause: "Article II, section 2, clause 2 of the United States Constitution provides that the President 'shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.' "

Subparagraph (B) states that "If, following Senate advice and consent, the President proceeds to ratify a treaty, the President may ratify only the treaty to which the Senate advised and consented." This principle, which is fundamental to the meaning and operation of the Treaty Clause, embraces two precepts:

—First, if the President transmits an international agreement to the Senate for its advice and consent pursuant to the Treaty Clause, the President may not bring that agreement into force without the Senate's advice and consent. Under the United States Constitution, when the President submits the agreement to the Senate, it constitutes an agreement which does not yet have force and effect. It may thereafter become effective as the "law of the land" for the United States pursuant to the Supremacy Clause of the Constitution (article VI, clause 2); and it may become effective for the United States as an international obligation. But it takes effect in either legal system only if the Senate gives its advice and consent. The President is precluded, constitutionally, from bringing the treaty into force domestically or internationally without the advice and consent of the Senate.

—Second, if, following such transmittal, the Senate accords its advice and consent, the President then has the option of bringing the treaty into force—he is not constitutionally bound to do so. Technically, therefore, it is the President, not the Senate, who "ratifies" the treaty, through deposit of an instrument of ratification in accord with procedures specified or envisaged by the treaty. Presidential ratification is carried out pursuant to Senate advice and consent.

Section 2: Paragraph (2)

Subparagraph (A) sets forth the central rule governing treaty interpretation: "Under the United States Constitution, a treaty is properly interpreted in good faith in accordance with the ordinary meaning to be given its terms in light of their context and in light of the treaty's object and purpose." The several terms of art used in this formulation have been developed over the course of many decades by innumerable scholars and tribunals, both international and domestic. It is therefore the central principle of treaty interpretation set forth in the Vienna Convention on the Law of Treaties (Article 31(1)) and is, appropriately, incorporated in the *Restatement of the Law, Foreign Relations Law of the United States (Revised)* (referred to hereafter as the *Revised Restatement*). "[I]t represents what states generally accept," the *Revised Restatement* comments, "and the United States has also appeared willing to accept it, regardless of differences in nuance."

This subparagraph in effect describes the scope of the President's authority to interpret a treaty. The President's interpretation of a treaty is entitled to great weight in United States law, and nothing in S. Res. 167 questions that authority. But the Constitution permits the President, acting alone, only to interpret existing treaties—not to make new ones. To remain within the scope of his constitutional power, the President must genuinely be engaged in the act of treaty *interpretation*. He cannot engage—by himself—in the act of treaty creation.

The location of the line between interpretation and creation is the subject of this subparagraph. It provides, in effect, that when the President reasonably construes a treaty in good faith in accordance with the ordinary meaning to be given its terms in light of their context and the treaty's object and purpose, he acts within the scope of his constitutional power. When his construction of a treaty cannot be so described, it represents not construction of interpretation at all, but the making of a new treaty, which he can do only with the advice and consent of the Senate. The "ordinary meaning" of treaty terms is to be gleaned in accordance with the other provisions of this paragraph.

Subparagraph (B) states that "the meaning [of a treaty] is to be determined in light of what the Senate understands the treaty to mean when it gives its advice and consent." This principle follows from the proposition that, if the President elects to ratify a treaty, he cannot ratify a treaty different from the one to which the Senate consented—which means that he cannot ratify a treaty with a *meaning* different from the meaning to which the Senate consented. If the Senate expressed an understanding as to the treaty's meaning, the President must respect that understanding. He can bring the treaty into force as its reflects the Senate's understanding, but he cannot bring into force a treaty that does not reflect the Senate's understanding. For the United States, the meaning of the treaty that the President ratifies is the meaning on which there existed a meeting of the minds between the President and the Senate at the time of Senate consent.

The Committee's former chairman, J. William Fulbright, testified directly on this principle, which he described as "exceedingly important. . . . It means simply and fundamentally that a law means what its framers intended it to mean and not what a later generation of policymakers would like it to mean, especially when, in the present case, the revisionists, through sophistry and tortured logic, attach to the law a meaning diametrically opposed to the intent of the framers."

Subparagraph (C) states that "the understanding of the Senate is manifested by any formal expression of understanding by the Senate, as well as by other evidence of what the Senate understood the treaty to mean, including Senate approval or acceptance of, or Senate acquiescence in, interpretations of the treaty by the Executive branch communicated to the Senate." The essence of this principle is that the Senate's understanding of a treaty's meaning may be explicit or implicit.

Explicit understandings comprise formal conditions to the Senate's consent. These conditions include amendments to the text of a treaty as well as amendments to the resolution of ratification, such as "reservations," "understandings," "declarations," "statements," and the like.

Implicit understandings represent informal—but equally significant—conditions placed on the Senate's consent. They are reflected in the various materials traditionally described as legislative history. These sources include the hearings, committee reports, and debates transcribed into the Congressional Record. These sources are regarded as indicia of legislative intent concerning the meaning of a legislative instrument, be it a statute or a treaty. Occassionally the legislative intent is expressed in unchallenged communications of the Executive contained in these sources. Under longstanding principles of textual construction, Executive communications to the Congress concerning the meaning of a text are evidence of the meaning of that text if Congress (or the Senate) acquiesces in that meaning. In other words, the legislative branch is deemed to be placed on notice by the Executive that certain words will be construed in a certain manner. If Congress wishes a different meaning to obtain, it may act so as to effect that different meaning. If Congress does not act, however, it is properly deemed to have accepted the meaning communicated by the Executive.

In determining whether the Senate consented to the ratification of a treaty pursuant to an implicit understanding, the President must look to the principles set forth in this paragraph of S. Res. 167. A rule of reason applies. Obviously, where the indicia of intent or understanding are few or inconsistent, no implicit intent can reasonably be said to exist. On the other hand, where the indicia of intent are numerous and largely consistent, an implicit intent can reasonably be concluded to exist. In such circumstances—where the intent of the Senate, in light of the legislative history of a treaty, can reasonably be concluded to be clear—the President is bound constitutionally to regard that intent as an implicit condition of the Senate's consent. The Chief Executive cannot bring the treaty into force unless it reflects that condition, and subsequent Presidents must interpret the treaty subject to that intent.

Subparagraph (D) states that "the Senate's understanding of a treaty cannot be informed by matter of which it is not aware, such as private statements made during the negotiations that were not communicated to the Senate." While essentially a truism, this proposition is fundamental to the question of treaty interpretation by the United States Government. Legislative intent is reflected by legislative history, which is by definition *legislative* history. It does not include history unknown to the legislature, which could not, logically, be part of the "meeting of the minds" between the President and the Senate extant on the date of Senate consent. The events, acts, or interpretations comprising such extraneous activity thus are not properly taken into account in determining what meaning U.S. treaty-makers—the Executive and the Senate—ascribed to the treaty at that time.

This subparagraph does not imply that an untransmitted negotiating record is in all circumstances irrelevant to treaty interpretation. A negotiating record not placed before the Senate at the time of its consent proceedings might conceivably have some bearing on the meaning of a treaty in the event that no meeting of the minds occurred between the President and the Senate with respect to a given issue. In such circumstances, the import of the negotiating record would not displace that of other indicia of the treaty-makers' intent.

In sum, where the Senate had no intent or understanding, a negotiating record could have bearing in resolving a question of treaty interpretation so long as the interpretation derived did not conflict with areas of interpretation where the Senate's understanding was clear. But in areas where the Senate clearly intends or understands a particular meaning, the question of what weight is to be accorded an untransmitted negotiating record can be decisively answered. The answer is, None.

Subparagraph (E) declares that "any subsequent practice between the parties in the application of the treaty is to be taken into account in interpreting the treaty." Like subparagraph (A), this principle has its origins in the Vienna Convention on the Law of Treaties (Article 31(3)). Also like subparagraph (A), subparagraph (E) is incorporated into the *Revised Restatement* of U.S. foreign relations law, which repeats this principle and notes that "it represents what states generally accept and the United States has also appeared willing to accept it regardless of differences of nuance and emphasis."

An important aspect of subsequent practice is consistent, subsequent *interpretation*. Statements made consistently and frequently by a government with respect to the meaning of a treaty provision represent "practice." In the case of the United States Government, this means that statements by executive branch officials, accepted or acquiesced in by the Congress, constitute subsequent practice to be taken into account in determining the meaning of a treaty.

The period of "practice" to be examined consists of that period beginning on the date of the treaty's entry into force and ending on the date on which a particular question concerning the treaty's meaning is raised. In the case of an international dispute, limiting the relevant period of "practice" in this way is necessary lest a government be permitted to bootstrap its way into the very interpretation in controversy by citing its own disputed claims as authority. Similarly, in a dispute between the Senate and the Executive, the Executive's interpretation constitutes evidence of a treaty's meaning only during that period when the Executive's interpretation is not contested. A challenge to such acts or statements brings about the termination of the period of "practice" properly taken into account in assessing the meaning of a particular treaty provision.

Section 2: Paragraph (3)

This paragraph states that "the President may not amend a treaty without the agreement of the parties and the advice and consent of the Senate." Both the Vienna Convention on the law of Treaties and the *Revised Restatement* of U.S. foreign relations law set forth the requirement that agreement between the parties precede any amendment of a treaty. This principle is obviously seminal in international law; treaties are made jointly and can only be modified jointly.

Also fundamental is the requirement of Senate advice and consent. Although not addressed directly by the *Revised Restatement,* support for the proposition is implicit in its declaration that "[t]he power of the President to terminate an international agreement does not imply authority to conclude a new one in its place." Were the President to amend an agreement on his own, he would in effect be terminating an old agreement and entering into a new one.

Interestingly, in another context, the Reagan Administration has itself been at pains to emphasize the importance of Senate involvement in the modification of treaties. In announcing that the United States would not sign the 1982 Law of the Sea Convention, President Reagan enumerated its "unacceptable elements" and said the United States wanted a treaty that would "not allow for amendments to come into force without approval of the participating states, including, in our case, the advice and consent of the Senate."

Constitutionally, the question of treaty amendment is crucial because a unilateral presidential power to amend treaties would vitiate the Senate's power to approve a treaty conditionally. With the agreement of the other party or parties, the President could simply ignore the Senate and remove any Senate-added reservation or any other treaty provision no longer desired. The Constitution does not accord the President such power. Instead, the President possesses a limited power of treaty interpretation, and he acts within the scope of that power when he interprets a treaty in accordance with the provisions of Section 2 (2)(A) of this Resolution.

When the President acts beyond the scope of his constitutional authority to interpret a treaty, he is in effect either amending that treaty or making a new one. And he is not entitled to disguise that reality by calling his action an "interpretation" or "reinterpretation" of the existing treaty. He is engaged in the act of treaty amendment or of treaty-making; each such act requires the advice and consent of the Senate.

Section 2: Paragraph (4)

Subparagraph (A) sets forth the Supremacy Clause of the Constitution (article 6, clause 2): that "all treaties made. . . . shall be the supreme Law of the Land."

Subparagraph (B) sets forth the Faithful Execution Clause (article II, section 3, clause 4): that the President is required to "take Care that the Laws be faithfully executed."

These constitutional provisions are included for the purpose of recalling the President's solemn obligation to abide by the provisions of treaties. Nothing in the United States Constitution permits the President to flip freely through *Treaties in Force* and, armed with a red pencil and white-out, make such additions, deletions, and modifications as he might wish. The President is not empowered to amend U.S. treaty commitments; he is charged to uphold them. Treaties are laws, and the President's duty of faithful execution applies as fully to treaty law as it does to statutory law. The President takes an oath of office in which he swears to "preserve, protect, and defend the Constitution of the United States." When the President violates a treaty provision, he violates his oath of office.

SECTION 3: SENATE CONSIDERATION OF THE ABM TREATY

Section 3 is a self-explanatory Senate finding concerning non-disputed aspects of the ABM Treaty's ratification proceedings in 1972:

> (1) On May 26, 1972, the Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (hereafter in this Resolution referred to as the "Treaty") was signed by the two parties.
>
> (2) On June 13, 1972, the President of the United States transmitted the Treaty to the Senate and requested that the Senate advise and consent to its ratification.
>
> (3) On August 3, 1972, the Senate, by a vote of 88–2, gave its advice and consent to ratification of the Treaty.
>
> (4) Between June 6, 1972, and August 3, 1972, representatives of the President communicated to the Senate the interpretation of the President concerning various provisions of the Treaty.

SECTION 4: TEXT OF THE ABM TREATY

Section 4 of the Resolution highlights certain key aspects of the ABM Treaty text:

> (1) Article I of the Treaty provides that "each party undertakes not to deploy ABM system for a defense of the territory of its country and not to provide a base for such a defense," except for certain limited deployments of fixed, land-based systems as stipulated in Article III.
>
> (2) Article II of the Treaty provides that an "ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory" and notes that such systems "currently" consist of ABM interceptor missiles, ABM launchers, and ABM radars.
>
> (3) Article V of the treaty provides that "Each party undertake not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."
>
> (4) Article XIV of the treaty provides that "Each party may propose amendments to this treaty."

(5) Article XV of the Treaty provides that "This treaty shall be of unlimited duration."

(6) Article XV of the treaty provides further that "each party shall, in exercising its national sovereignty, have the right to withdraw from this treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."

(7) Agreed Statement D, which was transmitted to the Senate as part of the treaty, is intended "to insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty," by providing that, if fixed land-based "ABM systems based upon other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future," their deployment would be subject to amendment by the parties in accordance with Article XIV.

SECTION 5: INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE DURING SENATE CONSIDERATION OF THE TREATY

In order to highlight key aspects of the ABM Treaty as presented by Executive branch officials to the Senate during ratification proceedings in 1972, Section 5 makes this finding:

(1)(A) With respect to Article II thereof, that the term "ABM systems and components" should be construed functionally, meaning that the term was not limited to currently existing technology or any specific technology, but applied to any ABM systems and components functionally able to counter strategic ballistic missiles or their elements in flight trajectory;

(B) That among such representations affirming that Article II should be construed functionally was the Secretary of State's formal letter of submittal, dated June 10, 1972, which stated (in a section entitled "future ABM systems") that "Article II(1) defines an ABM system" in terms of its function as a "system to counter strategic ballistic missiles or their elements in flight trajectory," noting that such systems "currently" consist of "ABM interceptor missiles, ABM launchers, and ABM radars"; and

(2) Consequently, with respect to Article V thereof, that the undertaking not to develop, test, or deploy any sea-based, air-based, space-based, or mobile land-based ABM system or components should be construed as applicable to any ABM system functionallly able to counter strategic ballistic missiles or their elements in flight trajectory.

SECTION 6: INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE FOLLOWING RATIFICATION OF THE ABM TREATY

In order to highlight key aspects of the "subsequent practice" of the United States with regard to the ABM Treaty, Section 6 makes a Senate finding that:

(1) After ratification of the Treaty, representatives of the President formally and consistently reaffirmed that the prohibition in Article V of the Treaty applies to the development, testing, and deployment of any sea-based, air-based, space-based, or mobile land-based ABM systems and components designed to counter strategic ballistic missiles of their elements in flight trajectory.

(2) Beginning in 1978 (the first year an annual Arms Control Impact Statement was required to be submitted to Congress), the Arms Control and Disarmament Agency, on behalf of the President, consistently reaffirmed that the Treaty prohibits the development, testing, and deployment of all types of sea-based, air-based, space-based, or mobile land-based ABM systems and components, including ABM systems and components involving technologies not in existence when the Treaty was ratified.

(3) Among such statements was the 1985 Arms Control Impact Statement, which stated that "the ABM Treaty prohibition on development, testing, and deployment of space-based ABM systems, or components for such systems, applies to directed energy technologies (or any other technology) used for this purpose."

SECTION 7: OBJECT AND PURPOSE OF THE ABM TREATY

Section 7 contains Senate findings concerning the object and purpose of the ABM Treaty, as follows:

(1) The object and purpose of the ABM treaty is set out in Article I of the Treaty, in which each party undertakes "not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense."

(2) Inasmuch as Article XV stipulated a treaty of unlimited duration, the functional interpretation of Article II is central to such object and purpose of the Treaty because technological advancement would render significant prohibitions in the Treaty inoperative if Article II were construed to apply only to ABM systems and components existing on the date of ratification.

(3) Also central to such object and purpose is the prohibition against the development, testing, or deployment of any sea-based, air-based, space-based, or mobile land-based ABM systems or components for the purpose of countering strategic ballistic missiles or their elements in flight trajectory, including ABM systems or components involving exotic technologies.

(4) This prohibition was communicated to the Senate during its consideration of the Treaty.

(5) This prohibition is supported by interpretive communications of the Executive while the Treaty was under consideration, by expressions of Senate intent during such period, and by subsequent, consistent practice and interpretation by both parties to the Treaty.

SECTION 8: DECLARATION OF POLICY

Section 8 combines key principles of treaty interpretation as set forth in Section 2 with relevant facts relating to the ABM Treaty as set forth elsewhere in this Resolution, and on that basis sets forth a declaration concerning the proper interpretation of the ABM Treaty.

It bears emphasis that this section does not constitute a Senate interpretation of the ABM Treaty. The interpretation of treaties is the President's prerogative, so long as he interprets a treaty within constitutional parameters. Section 8 is a declaration as to how, given the requirements of the Constitution and the pertinent facts surrounding the ABM Treaty, that treaty *should* be interpreted:

> (1) Under the United States Constitution, the meaning of the ABM Treaty is properly determined in accordance with the principles set forth in paragraph (2) of Section 2 of this resolution.
>
> (2) The development, testing, or deployment of any sea-based, air-based, space-based, or mobile land-based ABM systems or components for the purpose of countering strategic ballistic missiles or their elements in flight trajectory, including ABM systems or components involving technologies not in existence when the ABM Treaty was ratified, would be inconsistent with the provisions of the Treaty and would require an amendment to the Treaty; and
>
> (3) No amendment to the ABM Treaty may occur without the agreement of the parties and the advice and consent of the Senate.

VI. COMMITTEE COMMENTS ON THE "REAGAN REVISION"

The familiar story is told that, as the convention in Philadelphia adjourned and the ink dried on the new Constitution, a person in the crowd asked Benjamin Franklin what kind of government the Framers had given the country. "A Republic," Franklin is said to have replied, "if you can keep it."

Keeping it is very much what this Resolution is about. The Constitution protects individual liberty not merely through the direct safeguards found in the Bill of Rights, but also through the indirect protections provided by the separation of powers. As the Supreme Court recently declared, "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." That liberty is less likely to be lost in one overarching crisis than through a steady process of erosion: "There are," said James Madison, "more instances of abridgments of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."

The Administration's proposed "reinterpretation" of the ABM Treaty—referred to herein as the "Reagan Revision"—may seem on first impression to represent a very marginal case of erosion, if one at all. The issue may appear, indeed, to be nothing more than a technical dispute about how a certain treaty should be interpreted—a lawyers' quarrel. But it is far more than that, in both substance and constitutional significance.

Substantively, the ABM Treaty—the principal superpower arms accord still in effect—constitutes the foundation-stone for strategic nuclear arms control. Constitutionally, the Reagan Administration's challenge to this Treaty—the effort to alter the Treaty fundamentally without the consent either of the other party or of the Senate—represents not merely an attack on one treaty but a cavalier disregard for the rule of law itself, domestic and international.

Domestically, the President's unilateral "reinterpretation" assaults the Constitution's allocation of the treaty power—a central element in the doctrine of checks and balances—and also disparages the Constitution's requirement that the President take care that the laws be faithfully executed. Internationally, the Reagan Revision denigrates the central precept of international order—the principle that treaty obligations are to be carried out in good faith.

These issues are fundamental: Can the President, by calling an amendment to a treaty an "interpretation," dispense with the requirement of Senate advice and consent to that amendment? And can the United States alter a solemn international obligation by pretending that a treaty means something other than what both parties knew the treaty to mean when they ratified it?

The Committee thinks not.

A. CONSTITUTIONAL BACKGROUND

1. Intent of the Framers

Article II, section 2, clause 2 of the Constitution provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur . . . ." The Framers considered this division of the treaty power, in Alexander Hamilton's words, "one of the best digested and most unexceptional parts of the plan." It would have been "utterly unsafe and improper," Hamilton wrote, to entrust the power of making treaties in the President alone:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and circumstanced, as would be a president of the United States.

Accordingly, in the making of treaties, the Senate and the President were set one to balance the other. Explained James Wilson, "Neither the President nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced as to produce security to the people."

For the Framers, it was not enough merely to secure domestic protection against the abuse of presidential treaty-making power. Also vital was the necessity of protecting—indeed, of establishing—the young nation's honor internationally. Under the Articles of Confederation, the States had paid scant heed to obligations assumed by the Federal Government, which, said Madison, had recieved "complaints, already, from almost every nation with which treaties have been formed."

In devising the new Constitution, the Framers therefore made treaties binding on the states by denominating them the "supreme Law of the Land." They also made clear that the President was duty-bound to obey treaty provisions. Under article II, section 3, the President shall "take Care that the Laws be faithfully executed."

The President, said Hamilton, "is charged with the Execution of the Laws, of which Treaties are a part." Nor, argued John Jay, should these obligations be taken lightly: "[A] treaty is only another name for a bargain; and . . . it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely,* but on us only so long and so far as we may think proper to be bound by it." "Of course," said Jay, "treaties could be amended, but let us not forget that treaties are made not by only one of the contracting parties, but by both, and consequently that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter . . . them."

In sum, a treaty has weight both as a solemn obligation of the United States and as a part of the law of the United States. By swearing that he will "faithfully execute the office" and will "preserve, protect, and defend the Constitution of the United States," a President pledges to carry out treaties in force just as he will carry out laws in force.

2. Constitutional Custom and Practice

Because the Reagan Revision has raised questions concerning historical precedent, the Committee cautions that reliance on precedent requires that the incident in question actually constitute a precedent.

The Administration has based its "reinterpretation" of the ABM Treaty on assertions concerning the content of the Treaty's "negotiating record"—meaning, in this instance, an assemblage of internal U.S. Government memoranda recently compiled by the State Department's Legal Adviser. In defending the use of such a record, and trying to identify a precedent, the Administration and its supporters have pointed to the Jay Treaty, which after its ratification was the subject of Executive interpretation based upon that Treaty's negotiating record.

But this assertion overlooks a key fact, which entirely vitiates any precedential significance—and which indeed turns the argument around. The Jay Treaty negotiating record was *transmitted to the Senate during the ratification debate*—not pulled out of a hat 15 years after ratification. To the extent that the Jay Treaty episode is relevant to the current controversy, it is as still another demonstration of the Constitution's requirement that treaty interpretation be conducted within the scope of information and understandings known to the Senate when it grants consent to treaty ratification.

The committee is aware of *no* instance in which a treaty was reasonably supposed by the Senate, when it consented to ratification, to mean one thing, and it was argued later by the Executive to mean something altogether different. Even, however, if such a precedent could be adduced, the Committee recalls its comments in 1978 in reporting out the Panama Canal Treaties: "The Constitution is not amended by violation; express prohibitions and requirements, such as those contained in the . . . Treaty Clause, are not expunged through non-observance."

a. Understandings of the Senate

Custom, to the extent that it is pertinent, demonstrates a longstanding practice of the Executive to ratify the treaty—and only the treaty—that has received the advice and consent of the Senate. In the above-cited report, the Committee stated that "customary constitutional law in this country requires that the President give effect to treaty conditions imposed by the Senate." Those conditions may be explicit, as they are when formally reduced to express reservations, understandings, or other statements; or they may be implicit, as they were in the case of the ABM Treaty, where their content is to be gleaned from statments by Senators and by administration officials in which the Senators present acquiesced.

It bears heavy emphasis that the *form* of the Senate's understanding of a treaty's meaning is constitutionally irrelevant, for it is substance that controls. As Professor Louis Henkin, Chief Reporter of the *Revised Restatement*, testified before the Committee:

> The President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent. That is indisputable when the Senate has made its understanding plain in the form of a proposed reservation or an explicit understanding.
>
> The same principle governs when the Senate's understanding of a treaty provision is not expressed in a formal resolution, but is apparent from the Senate's deliberations leading to its expression of consent.
>
> The Senate's understanding of the treaty to which it consents is binding on the President. He can make the treaty only as so understood. He cannot make the treaty and insist that it means something else.

Professor Henkin directly addressed the question whether the Senate is required to "formalize" its understanding of a treaty's meaning, as proponents of the Reagan Revision have asserted. He said:

> I do not think the formality of a reservation or understanding by the Senate is a constitutional requirement. The Constitution says nothing of the kind. I think what the Constitution clearly implies is that it is what the Senate understands the treaty to mean—that that is what the treaty means for purposes of its consent.

b. Significance of an Untransmitted "Negotiating Record"

Custom also illuminates other matters, such as the weight to be accorded the so-called "negotiating record." The Committee uses this term with some hesitation, for three reasons:

—First, "negotiating record" is normally a term of art used to describe an *agreed* negotiating record. Since it is only the joint intent of the parties that has significance under international law, notes unilaterally compiled by one party cannot control a treaty's meaning. Accordingly, in the strict sense, no genuine "negotiating record" was consolidated and agreed to at the time the ABM Treaty was ratified; nor therefore will one ever exist. Rather, the "record" referred to today is an assemblage of internal U.S. Government documents put together only recently—through an office-to-office survey conducted by personnel working for the State Department Legal Adviser, Mr. Abraham Sofaer. The committee notes that the Soviet Union could as validly assert the significance of its own "negotiating record," which may or may not exist but which the United States has not yet seen.

—Second, there is no guarantee that the Legal Adviser's staff was able to find all the pieces of the U.S. "record" they have patched together. Indeed, Mr. Sofaer has candidly described the process, telling the House Foreign Affairs Committee in 1985 that he and his staff "obtained from various sources everything that we could find that might be relevant to the issue of future systems and components." Yet all must realize what Mr. Sofaer has acknowledged: that this disjointed assembly process might well have produced a fragmentary product—a collage, really, that represents something less than the total picture of what actually transpired during the ABM Treaty negotations. If Mr. Sofaer is to assert the preeminence of this assemblage in the interpretration of the ABM Treaty, he must logically be prepared to accept that the solemn obligations of the United States under the ABM Treaty must be altered each and every time a new document is recovered casting a different nuance of meaning on the collage.

—Third, even if—as seems unlikely—every piece of that "record" were recovered, there is no reason to believe that the American negotiators chose to reduce to writing all relevant materials bearing on the question now at issue. Of the nine key ABM Treaty negotiators on the U.S. side, eight today affirm that the traditional intepretation has always been valid; and the ninth—Ambassador Nitze, currently a Reagan adviser—also did so until the Reagan Revision was propagated in October 1985.

Thus, it seems highly likely that, had those officials believed in 1972 that the current issue would ever arise, they would have produced memoranda—which would now be a part of the "negotiating record"—affirming what is now called the traditional interpretation. Indeed, if members of the American negotiating team had believed that their instructions, responses, and various and sundry musings would someday be viewed as dispositive concerning the ABM Treaty's meaning, would they not have taken more care in assembling a single, complete and cohesive record?

For these reasons, the Committee believes that reference to the "negotiating record" recently assembled presents threshold, fact-related difficulties.

Even, however, if the "record" constructed by Mr. Sofaer were complete and accurate, an inescapable fact still confronts those who argue its pertinence: it was not part of the Treaty's legislative history. Former Senator J.W. Fulbright, chairman of the Committee on Foreign Relations in 1972 and floor manager of the ABM Treaty, testified as follows:

> Senator SARBANES. . . . [Y]ou did not have access to the negotiating record when you acted on this treaty, did you?
>
> Former Chairman FULBRIGHT. No.
>
> Senator SARBANES. You did not know what was in the negotiating record.
>
> Former Chairman FULBRIGHT. No, we didn't.
>
> Senator SARBANES. So, on what basis, then, did you proceed to ratify the treaty?
>
> Former Chairman FULBRIGHT. On the basis of our understanding of what the treaty meant, and it was, of course, given to us. We had testimony, from the Secretary of State and others, from the officials who did have access or who knew about the negotiating record, as to what they said it meant.

So far as the Committee can determine, no member of the Senate was given access to any "negotiating record" at the time the Senate considered the ABM Treaty, and the Reagan Administration has not argued otherwise. Indeed, no member of the Senate *could* have been given access then to what is now referred to as the "negotiating record" for the good reason that it did not then exist: Mr. Sofaer's assembly line had not yet begun to function. All that the Senate knew about the Treaty and its meaning was what the text stated and what the Nixon Administration told the Senate.

The Committee reiterates a proposition that, while self-evident, is crucially important: legislative history reflects legislative intent, and the legislature cannot intend what it does not know. Professor Laurence Tribe of the Harvard Law School testified as follows:

> . . . [T]here can be but one answer to the question of what place an indisputably secret negotiating history can have in the meaning of any law—whether domestic legislation . . . or a treaty negotiated by the President and consented to by a two-thirds vote of the Senate. Such secret histories cannot be taken into account because they were not part of the record on which the legally decisive votes were taken.

c. Application of the Revised Restatement

The most recent edition of the *Restatement of the Law, Foreign Relations Law of the United States (Revised),* which was approved by the American Law Institute last year, addresses the issues raised by the Reagan Revision and thoroughly supports the principles of treaty interpretation set forth in S. Res. 167. Indeed, in Senator Biden's drafting of S. Res. 167, the *Revised Restatement* was a central point of reference and its Chief Reporter, Professor Louis Henkin, was consulted frequently.

Under the heading "Interpretation of International Agreements," the *Revised Restatement* sets forth this rule, the elements of which were incorporated in S. Res. 167:

> (1) An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose.
>
> (2) Any subsequent . . . practice between the parties in the application of the agreement is to be taken into account in interpreting the agreement.

The *Revised Restatement* also recognizes the requirement that, even if there are only statements "in the Senate debates" that reflect the Senate's understanding, the President must respect such statements in good faith if he finds they represent the Senate's general understanding. In the case of the ABM Treaty, an extensive record of Senate hearings and debate reflects an unambiguous Senate understanding. This lack of ambiguity is underscored by the two Senators who voted against the Treaty; they opposed the Treaty precisely because it provided what the Reagan Administration wishes to claim it did not provide: a permanent ban on the development of nationwide ABM systems using future technology.

Against the standard of treaty interpretation set forth in the *Revised Restatement,* the Reagan Revision of the ABM Treaty fails on all counts. It reflects bad faith vis-a-vis both the Senate and the Soviet Union. It conflicts with the ordinary meaning of the Treaty's terms. It runs directly counter to the object and purpose of the Treaty. And it is inconsistent with 13 years of subsequent practice.

The Reagan Revision fails to meet the standards of interpretation precisely because it is *not* an interpretation of the ABM Treaty at all. It represents the promulgation of a fundamentally different treaty masquerading as an interpretation.

The Committee notes that those supporting the "reinterpretation" have, in debate, invoked the *Revised Restatement's* declaration that the President has a sole prerogative to interpret treaties and that the Seante has no such role. This is certainly a valid contention, properly understood. The *Revised Restatement* cites a 1901 Supreme Court decision (*Fourteen Diamond Rings v. United States)* which underscored that the Senate cannot seek to impose an interpretation on a treaty *after* its ratification. But that principle works neither against S. Res. 167 nor in favor of the Legal Adviser's theory and the "reinterpretation."

S. Res. 167 is not an attempt, in any legal sense, a treaty interpretation; rather, it represents a Senate affirmation of (1) certain constitutional principles pertaining to treaty interpretation; (2) certain facts pertaining to the ABM Treaty; and (3) certain conclusions which follow therefrom. The underlying principle in the *Fourteen Diamond Rings* case is that a treaty's meaning derives from the understanding which surrounded it *at the time of ratification.* Thus, neither the Senate nor any President can later act unilaterally to contravene that understanding. This is the very constitutional truth which S. Res. 167 seeks to reaffirm.

B. CONSEQUENCES OF THE REAGAN REVISION

1. Consequences for Future Treaties

Among the dangerous consequences of the Reagan Revision, none should be more readily apparent to the Administration officials who have perpetrated it than the deleterious effect on the process of gaining Senate approval of *future* treaties. Successful promulgation of the Reagan Revision would indeed, for the executive branch, be a classic Pyrrhic victory.

The reasons were well stated by Senator Nunn in testimony to the Foreign Relations and Judiciary Committees on S. Res. 167. First would be difficulties in the *ratification* of future treaties, for the Administration's position, if accepted:

> . . . would compel the Senate to incorporate into its resolution of consent to any treaty an amendment or understanding for every explanation given by an Executive Branch witness that was deemed important, lest it be disavowed as unilateral after ratification. Treaties so laden would sink under their own weight. It would be extremely difficult to achieve bilateral agreements and virtually impossible for the United States to participate in multilateral treaties.

But there would also be negative consequences for the *negotiation* of future treaties. For if a "negotiating record" were successfully used to justify the Reagan Revision of the ABM Treaty, "the Senate would feel compelled," Senator Nunn predicted, "to request in each case a complete record of the negotiating history in order to insure that no secret understanding would emerge contrary to assurances given the Senate."

The Committee warns against taking this path. Conceivably, occasions may arise when publication of a negotiating record, or parts thereof, could serve a useful purpose. The current ABM controversy, which occasioned the partial release of secret U.S. records of the negotiation, may be one such instance. And certainly, after an appropriate passage of time, such records are valuable source material for historians. But to institutionalize a practice of automatic and immediate disclosure of all negotiating details would clearly have a dramatically chilling effect on future negotiations, inhibiting candid exchange and inviting posturing on the part of negotiators for both domestic and international audiences.

It is precisely for such reasons that negotiating records have traditionally been kept confidential. Yet the loss of such confidentiality would be the ineluctable consequence of accepting the Reagan Revision. How could a future Senate, asked to approve a significant treaty, do its job conscientiously *without* insisting that the negotiating record be made public?

Thus, it is not simply the prerogatives of the Senate that would suffer were the Reagan Revision to find acceptance. Ultimately, it is the presidency itself that would be undercut. The consequences of the Administration's position would be a *weakened* presidency—distrusted by the Senate, hamstrung by an inability to conclude treaties, and crippled in diplomatic dealings with foreign powers.

2. Consequences Under International Law

While weakening the American presidency, the Reagan Revision would also weaken international law, perhaps the most fundamental principle of which is *pacta sunt servanda*—the requirement that treaties be performed in good faith.

This precept, it has been said, is the glue that holds the international system together. Issues of national honor and integrity aside, it is important that the United States live up to treaty obligations for reasons of direct self-interest. Trust is a commodity in short supply in international affairs. But reliability—the tradition of adhering to pledges—is crucial to any international order. Adherence to pledges embodied in treaties is indeed the foundation of international commerce and diplomacy.

For the United States to flout such obligations is not only to undermine our own position as world leader and central participant in the international community. It is to undermine the international system itself. As Woodrow Wilson argued in successfully persuading Congress to repeal Panama Canal legislation that contravened previous international arrangements, the United States is simply "too big and powerful and self-respecting" to put a strained interpretation on its promises. This Wilsonian spirit eventually found expression, decades later, in the American leadership which produced the post-World War II international order.

Some would respond that international law is not a suicide pact—that the United States should not be bound to uphold international obligations when the Soviet Union has so often violated them. The answer, of course, is that the United States must always be guided by the need to defend its supreme national interests. But one supreme national interest of the United States is to retain world respect. What standing would this nation have to criticize *Soviet* treaty violations—and to demand satisfactory resolution of alleged violations—if we accord little worth to the sancity of our own pledges?

In the case of the ABM Treaty, there is a widely-recognized Soviet violation: the Krasnoyarsk radar, which by all evidence contravenes the Treaty requirement that all early-warning radar systems be sited on territorial borders so as not to provide a potential battle-management ABM capability. But this violation is also recognized as being, in and of itself, militarily insignificant; it is a decidedly marginal issue which the United States could more properly deal with under the concept of "proportional response."

In contrast, the Reagan Revision of the ABM Treaty is a flagrant act of Treaty distortion which totally undermines the very object and purpose of the Treaty and which, accordingly, has raised deep concern even among America's staunchest allies. The consequences for international law are dismal when the world's erstwhile champion of international law chooses to disregard its obligations so blatantly.

3. Consequences Under Domestic Law

Violation of the ABM Treaty by the United States would violate not only the Treaty Clause and the Faithful Execution Clause of the Constitution; it would also breach federal common law.

Federal common law consists of that body of law made by the federal courts, which have long engaged in limited law-making activities, carried out by leave of Congress and always subject to superceding legislation. Congress may displace a rule of federal common law merely by enacting a statute so doing; the court-made rule then ceases to exist. In the absence of statutory authorization, however, the President is bound by certain rules of customary international law—rules clearly defined and widely accepted—which are part of federal common law. The principle of *pacta sunt servanda* is such a rule.

C. EVALUATION OF THE LEGAL ADVISER'S THEORY

1. Summary of the Legal Adviser's Theory

In justifying the Reagan Revision, the Legal Adviser of the State Department has shaped a rationale which the Committee believes can, in full fairness, be summarized as follows (quotations are drawn from Mr. Sofaer's testimony):

> *(a) Source of Meaning.*—A treaty's meaning derives only from communications between the parties. Statements made in internal ratification proceedings are of no weight unless formally communicated.
>
> *(b) Role of Senate.*—When the Senate so directs, the Executive formally communicates the Senate's understanding to other parties. But the Senate must do so formally, through the adoption of a condition placed upon its consent. When the Senate declines to condition its consent, the Executive is not compelled to communicate "lesser," implicit expressions of the Senate (e.g., colloquies, committee reports, floor statements). Nor is the Executive compelled to communicate to the other party interpretive statements concerning the treaty made to the Senate by Executive officials during the ratification proceedings.
>
> *(c) Practicality of Taking Ratification Proceedings into Account.*—The view that implicit Senate understandings are controlling would suggest an impractical "duty to monitor" other countries' ratification proceedings; the United States would have to "detail legally and technically trained personnel to observe such proceedings" and to make "judgments about legal and constitutional systems with which we are not familiar."
>
> *(d) Mutuality of Obligation.*—"When [the Senate] gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it was provided." To take ratification proceedings into account would put the United States at a disadvantage as against other states, which consider themselves bound only to what they tell us they agree to. This would deny the United States the benefits of mutuality of obligation.

2. Committee Evaluation

The Committee recognizes the difficulty of the Legal Adviser's task in trying to justify a scheme by which the Senate's original understanding of a treaty may be regarded as irrelevant to its subsequent interpretation. The Legal Adviser's effort to do has necessarily required a confused cobbling of arguments from constitutional and international law.

(a) Source of Meaning.—The Legal Adviser's principal premise is the equivocal assertion that a treaty's meaning derives from communications between the parties. This is true—under international law. But it is not true under United States law.

Under U.S. domestic law the governing rules are, by definition, those of the United States Constitution. The Constitution permits the incorporation into U.S. law of some principles of international law, but there is none that it *requires* be incorporated. Moreover, there is no requirement under international law that a nation give domestic force to the norms of international law. Consequently, the Legal Adviser's analysis, grounded as it is on international law, is entirely misdirected in shedding light on the requirements of treaty interpretation mandated by the Constitution.

Constitutionally, the President is required to respect the Senate's conditions when the Chief Executive ratifies a treaty following Senate advice and consent. The President cannot cause the United States to become a party to a treaty to which the Senate has not given its advice and consent. Nor can he cause the United States to become a party to a treaty different from the one to which the Senate has given its advice and consent. Thus, if the United States is to adhere to a given treaty, it can adhere only to the treaty concerning which a "meeting of the minds" has occurred between the President and the Senate.

(b) Role of Senate.—In the implementation of this constitutional principle, the particular form of the Senate's understanding is not relevant. The Legal Adviser argues that the Senate knows how formally to condition its consent to a treaty and it knows how expressly to direct the President to respect such a condition, and that in the absence of either the President is free to disregard the Senate's understanding. But this assertion leads to absurdity.

Under the Sofaer theory, it matters not how fundamental the issue, or how clear and oft-expressed the Senate's understanding. If, for example, the text of a treaty appears to means X, if the President personally assures the Senate that a treaty means X, if the Secretary of State and other executive branch spokesmen solemnly reiterate this assurance in hearings, if the report of the Foreign Relations Committee repeats that interpretation, and if 100 Senators take the Senate floor to state that their understanding is identical, a President would still, if guided by the Sofaer theory, feel free to ignore his earlier assurance and to disregard the Senate's understanding in bringing the treaty into force or in interpreting it later—unless the Senate had taken the bizarre step of *formally* conditioning its acceptance on its own extensive, elaborately worded, perhaps treaty-length rendering of interpretation X. According to the Sofaer theory, the President and his successors are not compelled constitutionally to honor the apparent meaning of a treaty text and the interpretation presented to the Senate during ratification proceedings.

Applying this theory to the ABM Treaty, Judge Sofaer hypothesizes that President Nixon—through negligence or inadvertence—brought into force a version of the ABM Treaty altogether different from the one described to the Senate by his representatives, that this was constitutionally permissible, and that the Reagan Administration has simply, years later, acted to correct an enormous misunderstanding. In the Committee's considered judgment, this is nonsense.

First, the U.S. "negotiating record" provides no serious evidence of the slightest divergence between the private understandings and public representations of the ABM Treaty negotiators. Based upon a review of that record by Committee members and staff, the Committee agrees with Senator Nunn that the "preponderance of evidence in the negotiating record supports the Senate's original understanding of the treaty—that is, the Traditional Interpretation," and concludes that Mr. Sofaer has engaged in an elaborate effort to rewrite history.

Second, contrary to Mr. Sofaer's contentions, a President's failure to respect the Senate's original understanding of the treaty, however manifested, would represent a grievous breach of his constitutional obligations. Professor Louis Henkin affirmed the President's obligation to respect implicit as well as explicit Senate understandings:

> It seems to be suggested . . . that if the Senate does not make its understanding a condition of its consent, how the Senate interpreted a treaty is essentially irrelevant. That is not correct. In my view, if the Senate's understanding is clear, the President can make the treaty only in accordance with that understanding, whether or not that understanding is expressed as a condition of consent. Indeed, if there is any reason to doubt that the Senate's understanding is shared by the other party or parties to the treaty, or if it appears that the Senate's understanding might somehow differ from what the treaty might be held to mean as a matter of international law, the President is bound to communicate the Senate's understanding as being the understanding of the United States when he make the treaty.

Professor Laurence Tribe added as follows:

> [Mr. Sofaer] presumes that the President unilaterally "makes" treaties with foreign nations which the Senate subsequently is asked to ratify. The Constitution provides otherwise. The President has the power to "make treaties" only "by and with the Advice and Consent of the Senate . . . provided two-thirds of the Senators present concur. No treaty is "made" until the Senate has given its consent. This is how a treaty becomes part of "the supreme Law of the Land."
>
> Under the Legal Adviser's model, the meaning of the ABM treaty is to be gleaned not by examination of what the President and the *Senate* agreed upon, but by examination of what the President and the *Soviets* agreed upon—regardless of what the President may or may not have told the Senate about what he had negotiated. *This is tantamount to saying that President Nixon made the ABM treaty the supreme law of the United States with the advice and consent of the Soviet Union.* Obviously, the ABM treaty that became law in 1972 was the ABM treaty, accompanied by various formal submissions, to which the Senate gave its consent. The Executive may not now unveil a hitherto secret record of negotiations or understandings to defend an interpretation of the law inconsistent with what the Senate was led to believe it was accept-

> ing. To allow such a ploy would be to allow the Executive to make treaties *without* the advice and consent of the Senate. Nothing in the Legal Adviser's analysis makes this position plausible.

The absurdity of the assertion that the President must respect only formally-expressed Senate understandings was underscored by Professor Abram Chayes, who served as the State Department Legal Adviser under President Kennedy. What, he asked, is the Senate "to do when, as in the case of the ABM Treaty, there is no dispute about the meaning of the text and no wish to change the meaning?":

> The very absence of reservations or understandings itself confirms that the Senate understood the treaty to be susceptible of only one interpretation—the one that emerges from the plain meaning of the text and was confirmed by representatives of the Executive at the time of ratification. What is important about [the] ratification history of this Treaty is that it shows there was no issue of interpretation. Everyone agreed.

Under traditional U.S. practice, the Senate has used conditions—reservations, understandings, declarations, amendments, and the like—as a means of clarifying or altering the legal rights and obligations to be established by the treaty. However, if the text of a treaty is clear to the Senate, and if there is no disposition to alter the obligations entailed by the treaty, there is no reason for the Senate to append formal conditions to its resolution authorizing ratification.

Consequently, the Legal Adviser's model would impose upon the Senate a requirement to perform practical acts of fundamental illogic: to express formal conditions concerning provisions of agreements about which there is no disagreement. And if the Senate failed to do so, those very matters—about which genuine consensus exists—would be most subject to subsequent "reinterpretation" by the President!

The instant case—the question of a "narrow" versus "broad" interpretation of the ABM Treaty—illustrates this perfectly. Because in 1972 only the "narrow" interpretation was presented to the Senate, the "narrow" versus "broad" question never arose. Thus, the Senate had *no reason* to address itself specifically to this issue by way of a formal condition. Only with the prescience required to anticipate that a future President would attempt to overturn the very object and purpose of the ABM Treaty, while purporting to continue to adhere to the Treaty, could the Senate have found reason to declare itself formally on the question now at issue.

The Committee takes note of the argument, offered by proponents of the "reinterpretation," that the Standing Rules of the Senate require that the Senate act as a body in approving treaties. This fact is invoked in order to suggest that anything said or done by a Committee or individual Senator is irrelevant with regard to the subsequent interpretation of a treaty. But the requirement that the Senate act as a body merely restates what no one questions: that the Senate could not delegate to a Committee, or to an individual, the task of giving its consent to treaties, any more than it can delegate the task of enacting statutes. The requirement does not preclude reference to hearings, Committee reports, or statements of individual Senators as a means of determining what the Senate as a body intended—precisely as such hearings, reports, and statements are used to establish the intent of statutes. To argue otherwise is to argue against the very concept of legislative intent.

(c) Practicality of Taking Ratification Proceedings Into Account.—In his testimony, Mr. Sofaer argued that if ratification proceedings were to be seen as relevant to a treaty's meaning, the United States would have to send trained personnel to monitor other treaty signatories' ratification proceedings. But this worry is unnecessary.

- —First, few other nations have a bifurcated approval procedure comparable to that of the United States; legislative approval of treaties is the exception, not the rule. Even in such parliamentary democracies as the United Kingdom, Australia, and India, there is no constitutional requirement for legislative aproval of treaties. This should not be surprising; in unitary, parliamentary governments, the "executive" which negotiates treaties is, after all, a part of the legislature.
- —Second, for prudential reasons the State Department does in fact already monitor certain states' ratification proceedings, particularly on key agreements. A recent example concerns the Panama Canal Treaties. During and following Senate consideration, the Foreign Relations Committee was kept thoroughly briefed by the Executive concerning legislative developments in Panama that might bear on the rights and obligations imposed by those Treaties. Indeed, certain Senators who opposed the Treaties alluded to Panamanian legislative events in contending that Panama was interpreting the Treaties in an unacceptable manner.
- —Third, the United States has, as a matter of past practice, regarded its own ratification proceedings as having international significance. In three of the six contentious cases in which the United States has appeared in the International Court of Justice, the State Department's Legal Adviser has relied on the record of Senate ratification proceedings in urging a particular interpretation of a treaty. In those cases, the Legal Adviser has found ratification proceedings highly relevant—indeed authoritative—on the question of treaty meaning.
- —Finally, it is quite reasonable to expect—indeed, disingenuous to pretend otherwise—that other nations are sufficiently interested and capable to monitor U.S. ratification proceedings. Can anyone seriously believe that the Soviets have remained studiously oblivious to Senate proceedings with regard to arms control? The Committee is well aware of the contrary; Soviet diplomats are diligent in the extreme in monitoring deliberations of the Senate, most particularly on matters pertaining to U.S.-Soviet relations. Moreover, in the words of Professor Tribe:

> [S]urely it is not asking too much of the Soviets—who evidently know every word whispered behind the locked and guarded doors of the American Embassy—to keep

> abreast of the *public* exchanges between the American Executive and the American Senate during the process of advice and consent. The Soviets come to the negotiating table well aware that the treaty they would make must satisfy the Senate as well as the Executive, because those two institutions *together* speak for the United States under the Constitution. Who can doubt that the Soviets followed the American ratification of the ABM Treaty very closely indeed? To advocate presidential power to deceive the Senate is bad enough; to do so on the basis of Soviet stupidity is sheer folly.

In sum, it is simply not accurate to contend that a new or unrealistic surveillance "duty" would be imposed on the U.S. Government or other governments by the requirement that ratification proceedings be regarded as centrally relevant to the meaning of treaties. Indeed, until the "reinterpretation" initiative brought forth the Legal Adviser's extraordinary theory, their relevance had never been questioned.

(d) Mutuality of Obligations.—The overarching specter posited by the Legal Adviser is of a procedure which could bind the United States more strictly under its own constitutional law than it—and the other party—are bound by international law. In short, he posits an absence of mutuality of obligation through excessive concern for constitutional niceties.

The Committee recognizes that the intersection of constitutional and international law raises a variety of "iffy" questions. Suppose, for example, that the negotiating record of a treaty and the subsequent, consistent practice of the parties support interpretation X and the text and ratification proceedings support interpretation Y; what interpretation should apply? This and other questions make for wonderful law school "hypotheticals," although the likelihood is minimal that most such examples would actually occur.

This is not to ignore the very real possibility that a disparity in domestic and international obligations could actually arise. The best example is an agreement entered into in technical violation of a nation's domestic law. Under international law, such an agreement can be binding internationally notwithstanding the domestic violation. Indeed, such an agreement *is* binding internationally unless the agreement violates a "fundamental rule" of domestic law and that violation is "manifest." Because the domestic law is contravened, the agreement is invalid domestically, but binding internationally.

The Legal Adviser implies that the problem of reconciling two intersecting systems—domestic and international—is one created by those who wish to assert the relevance of the Senate's role in the treaty ratification process. In fact, the problem of harmony—to the limited degree it exists—inheres in the very existence of two separate but interactive systems. To achieve harmony between the two is, as experience demonstrates, generally possible. But harmony is not the only interest at stake. Surely the interest of the United States in preserving the integrity of its domestic legal order is far weightier. Certainly harmony should not be sought by dispensing with clear imperatives of the Constitution.

In any case, the practical reality is that problematical instances are extremely rare and—directly to the point—that the ABM Treaty is not, on the basis of relevant circumstances, such an instance. With the ABM Treaty, the only issue is whether the text, the ratification record, and the subsequent practice should control when *all* support the same interpretation. The Committee has no doubt that the answer is emphatically yes.

3. Justice Department Analysis

In an April 1987 memorandum to the State Department Legal Adviser, Assistant Attorney General Charles J. Cooper of the Justice Department's Office of Legal Counsel analyzed the legal issues underlying the "reinterpretation" and came to conclusions generally supportive of the Committee's position:

—*Source of Meaning:* As to the ultimate source of meaning in a treaty, the Legal Adviser asserts that when the Senate "gives its advice and consent to a treaty, it is to the treaty that was made, irrespective of the explanations it is provided." The Assistant Attorney General concludes that "the deliberative record that is created when the Senate advises and consents to a treaty cannot be ignored in the interpretative process."

—*Formality of Senate Conditions:* The Legal Adviser asserts that only formal Senate conditions have interpretive meaning and that to infer a particular interpretation on the basis of Senate acquiesence in Executive communications "would be a dangerous practice, and certainly one with no empirical basis." The Assistant Attorney General concludes that "the portions of the treaty ratification record that should be accorded more weight as to the treaty's meaning are the representations of the executive—the draftsmen, in effect, of the treaty." The Assistant Attorney General declares that:

> "If . . . the ratification record unequivocally shows that the President presented the treaty to the Senate based on specific, official representations regarding the meaning of an ambiguous provision, that the Senate regarded that understanding as important to its consent, and that the Senate relied on the representations made by the executive branch in approving the treaty (and thus in refraining from attaching a formal reservation setting forth the understanding), we believe the President would, in effect, be estopped from taking a contrary position in his subsequent interpretation of the treaty, just as he would be bound by a formal reservation or understanding passed by the Senate to the same effect."

The Assistant Attorney General's legal analysis concludes as follows:

> Obviously, a President could not negotiate a treaty with other nations on the basis of one understanding of its import, submit the treaty to the Senate on a wholly different understanding, and then, in implementing the treaty, rely solely on the understanding he had reached with the other parties. Similarly, he could not reach a secret agree-

> ment with the other party that substantially modifies the obligation and authorities created by the text of the treaty submitted to the Senate, and then seek to use the secret agreement as a basis for actions inconsistent with the text of the treaty. Such results would essentially eviscerate the Senate's constitutional advice and consent role, because it would deprive the Senate of a fair opportunity to determine whether, or with what conditions, the treaty should become the "supreme law of the land." Accordingly, in such extreme cases, we would have little doubt that, as a matter of domestic law, the courts would construe the treaty as presented to and accepted by the Senate, even if as a matter of international law the treaty might have a different meaning.

What the Assistant Attorney General describes as unacceptable is precisely what the Legal Adviser seeks to affirm. The Legal Adviser claims (in the above words of the Assistant Attorney General) that President Nixon negotiated one treaty with the Soviet Union on the "basis of one understanding of its import" (i.e., the broad interpretation), then "submitted the treaty to the Senate on a wholly different understanding" (i.e., the narrow interpretation). On this premise, the Legal Adviser asserts that a President can "then, in implementing the treaty, rely solely on the understanding . . . reached with the other parties."

As a matter of history, the Committee rejects the Legal Adviser's premise: that superpower negotiators reached agreement on the broad interpretation. But in *any* event the Assistant Attorney General is correct: what the Legal Adviser asserts "would essentially eviscerate the Senate's constitutional advice and consent role . . ." Like the Assistant Attorney General, the Committee has "little doubt that, as a matter of domestic law, the courts would construe the treaty as presented to and accepted by the Senate."

Perhaps, had the current Legal Adviser asked and taken into account the opinion of the Justice Department *before* announcing to the world a new and brazen-labeled "legally correct interpretation" of the ABM Treaty, he might have spared the Administration—and the United States—an unnecessary constitutional controversy and an embarrassing deviation from this nation's honorable history of devotion to solemn international obligations.

D. THE PROPER ROLE OF THE LEGAL ADVISER

The Senate Foreign Relations Committee can only lament the decisionmaking process by which the Administration has attempted its radical revision of the ABM Treaty. That process cannot be surmised from a snapshot of any point in the chronology, for a frozen moment would suggest a policy process that is merely irregular. Greater truth emerges from reviewing the series of misstatements followed by repudiations superseded by disavowals—every step informed by one maxim: interpret now, justify later. The full picture is of a policy process not merely unusual, but so substandard as to breach the requirement of international law that a treaty be interpreted in good faith.

The Reagan Administration's first formal legal statement attempting to justify its unprecedented treaty "reinterpretation" emanated from the Legal Adviser in October 1985, when Mr. Sofaer issued a memorandum concluding that such radical action was justified by a review of the Treaty's "negotiating record."

Mr. Sofaer made this claim having consulted no member of the 1972 negotiating delegation—with the lone exception of his colleague, Ambassador Nitze. Nor did Mr. Sofaer even have before him the full "negotiating record" his novel theory of treaty interpretation required. Indeed, as recently as March this year, he freely acknowledged that there were still "many memos—and they are continuing to turn up, Senator, out of the boxes that are arriving in my office from various storage facilities . . ." Thus did Mr. Sofaer summarize his truly astounding theory that a treaty's meaning may always, at any time, be subject to alteration by the chance discovery of a document, internal to the government of either party to a treaty, pertaining to its negotiating history.

Nonetheless, beginning in October 1985, Mr. Sofaer had no hesitation in assuring all who would listen that if only they could review the secret record, they too would agree that the Reagan Revision was justified. He so testified to key congressional committees that month. He so lectured the American Society of International Law in April 1986. And he so instructed readers of the Harvard Law Review in an article published June 1986. "Trust me," was his plea.

Mr. Sofaer offered assurance that not only did the "negotiating record" support his new reading of the Treaty, but that the ratification record did as well. This latter assurance, however, Mr. Sofaer repudiated—for a while, at least. Confronted with evidence that his account of the ratification record was a distortion, Mr. Sofaer admitted in a letter to Senator Nunn in March 1987 that he "did not provide a complete portrayal of the ratification proceedings with respect to this issue." He wrote further that he "did not review this material personally," and shortly thereafter informed Senator Levin that the problem was attributable to "young lawyers" in his office.

This was the state of affairs when the Foreign Relations and Judiciary Committees undertook joint hearings earlier this year. Though Mr. Sofaer was obviously a key witness, he resisted the Committees' invitation to appear, claiming to be in the midst of another thorough "study" of the ratification record and about to undertake a separate "study"—apparently for the first time—of "subsequent practice" under the Treaty. His thinking on the desirability of testifying apparently clarified by the prospective issuance of a subpoena, Mr. Sofaer appeared on March 26.

Given his ongoing "study" of the ratification record, the Committees might have expected Mr. Sofaer to display on March 26 a tentativeness concerning the propriety of the "reinterpretation." It would, after all, hardly be intellectually honest to engage in the study of a matter—the ratification record--which had no bearing on the ABM Treaty's meaning. Purportedly, the Legal Adviser was engaged in a serious review of one critical element on which his ultimate conclusions would depend.

Consequently, the Committee requested that Mr. Sofaer confine his testimony to what could be addressed without further study: basic constitutional principles surrounding the making and interpretation of treaties. To the Committees' surprise, therefore, Mr. Sofaer had not the slightest hestitation in affirming the Administration's "reinterpretation" once again and reiterating his unqualified endorsement of its legality. Evidently, contrary to what the Committee had earlier been led to believe, the "study" on which Mr. Sofaer was then embarked would have no effect on the Administration's view of the Treaty.

The Committees should probably not have been surprised. For it has become increasingly clear that the Administration has relied on Mr. Sofaer's "studies" not to determine what is legally valid but to justify aims already decided on. Mr. Richard Perle, the Assistant Secretary of Defense who led the Pentagon's effort to rewrite the Treaty, testified to the Committe that he had not once read the Legal Adviser's original analysis. From all the Committee can determine, Mr. Perle's driving curiosity concerning the legality of the "reinterpretation" set the standard for the Administration.

The measure of Mr. Sofaer's judicial instinct was illustrated when he represented to the Committees that Senator Nunn had joined him in finding the text of the ABM Treaty "ambiguous." This was a wholly false claim, given that Senator Nunn had just commenced a series of widely publicized speeches detailing the lack of evidence suporting the Administration's interpretation of the Treaty. Informed of Mr. Sofaer's testimony, Senator Nunn immediately wrote to the Committees that Mr. Sofaer "misrepresents my conclusions on the subject." Senator Nunn underscored that he had gone to "some lengths in my speech, including repeating a key sentence, to present my conclusions in a manner which would preclude anyone from misconstruing" the conclusions. Obviously, Mr. Sofaer was undeterred.

As to the ratification record, Mr. Sofaer's original contention—set forth in October 1985 and temporarily repudiated in his March 1987 testimony—were soon reinstated in a May 1987 statement announcing that his new "study," now completed, showed that the ratification record permits the "reinterpretation."

The process that has produced such "studies" was related to the Committees by one of the participants, Mr. William Sims, an attorney in the Legal Adviser's office from August 1985 to January 1986. A junior lawyer who in his own words had "limited experience in international law," Mr. Sims was assigned to help Mr. Sofaer analyze the "reinterpretation" issue. Yet Sims found himself denied access to a crucially relevant DOD memorandum critical of the "reinterpretation," and soon became aware that U.S. Government experts known to be unfriendly to the "reinterpretation" effort were being systematically ignored. "Their views were not solicited," Mr. Sims testified. "There was no full interagency deliberation." [L]oyalty has been escalated to such a high level that objectivity seems to have been lost." As a consequence, "the procedure was flawed, resulting in conclusions that were inaccurate."

Mr. Sims resigned from Mr. Sofaer's office in protest to enter private practice, but not before concluding that any balanced analysis of the text of the Treaty, the negotiating record, and its subsequent interpretation would "provide a document . . . that is compelling in its support of the narrow interpretation."

Having reviewed this sorry chapter in the institutional life of the Office of the State Department Legal Adviser, the Committee notes the standard set by a former legal adviser to the British foreign office, Sir Ian Sinclair, who gained a reputation within and without his government as an immovable rock when he arrived at the judgment that a certain policy was legally impermissible. The Foreign Minister, Lord Carradon, took to introducing him as "my abominable no-man."

The United States Government needs such public servants—persons willing to place duty over ambition in defending the integrity of the law. Nowhere is this more true in the law of foreign relations, where the discipline of judicial review is often unavailable. Here, Congress and the State Department share a special responsibility for heightened care in respecting applicable international and constitutional standards. Frequently, there will be no judicial backstop if they err.

The Legal Adviser stands alone among lawyers within our Federal Government. He is the first guardian, and often the last, of the United States Government's commitment to the rule of law in two different legal systems—constitutional and international. His title is unique among the chief lawyers for Federal Departments and Agencies. He is not called "general counsel" because he is, in effect, not only general counsel to the Department of State, but also the prime counselor to the entire Government, including the President, on legal matters involving international affairs and diplomacy. His title is shared with colleagues in the foreign offices of other nations; together, they represent the principal expositors of the law of nations for their governments and the world.

The Legal Adviser is thus charged with American compliance with—and American efforts to enforce—the most momentous elements of the rule of law: rules of constitutional power, of international commitment, of war and peace. It is the Legal Adviser who, through his own integrity and the integrity of the legal analysis he oversees, must set the highest standards in honoring the law of the Constitution and the law of nations. It is the Legal Adviser who, when asked to "legalize" short-term policy ends over constitutional means, must be prepared to say no. It is the Legal Adviser who, regardless of political pressures, must revere law as the alternative to anarchy.

By failing to meet that standard, Mr. Sofaer has done a disservice to the Office of Legal Adviser.

Ultimately, it is that—a respect for law—which is at the heart of this issue. Justice Brandeis said this:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, omnipresent teacher. For good or ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare . . . that the end justifies the means . . . would bring a terrible retribution.

E. CONCLUSION

The Committee can find no evidence to contradict the conclusion that the Reagan Administration's "reinterpretation" of the ABM Treaty constitutes the most flagrant abuse of the Constitution's treaty power in 200 years of American history.

American constitutional principles should apply notwithstanding the ends at issue. The Committee therefore urges that, as Senators weigh the "reinterpretation" question, they isolate the constitutional issue from any position they may hold regarding the deasirability of ABM systems or the Strategic Defensive Initiative.

The importance of subordinating short-term policy expediency to long-term constitutional principle is perhaps best underscored by way of a hypothetical example that cuts in a different policy direction. Thus, suppose that in the current INF talks the American side secretly agreed to permit the Soviets to convert their SS-20 missiles into intercontinental-range SS-16s. And suppose further that an INF treaty were then ratified with no reference to this secret understanding. Would those who now assert the preeminence of the negotiating record seriously contend that ratification of this INF treaty had elevated this secret agreement to the status of a solemn treaty obligation of the United States?

Far less hypothetically, will not the Senate be required to act aggressively to prevent any such occurrence? Indeed, unless the Administration reverses its position, ratification of an INF treaty would require a full exposition of the negotiating record leading up to each and every treaty provision and, in the Senate's resolution of ratification, a formal condition or understanding associated with each provision. Thus, the Administration's theory of treatymaking, having cast a dark shadow over the Senate's consideration of all future treaties, could severely complicate and greatly prolong the Committee's consideration of an INF treaty—and thereby jeopardize early ratification of that treaty.

In the metaphor of the Committee's distinguished former chairman, Senator J.W. Fulbright, those who would dispense with constitutional principles in the interest of furthering an expedient goal are:

> . . . rather like the defenders of a besieged fort firing their artillery through the protecting walls instead of over them: They may blow up some of the attackers on the other side, but in the process they are making a nice opening through which the enemy can pour into the fort in their next attack.

It has been argued that, by threatening to develop ABM technology in violation of the ABM Treaty, the Reagan Administration has strengthened its hand in arms talks with the Soviet Union. In the Committee's view, this is wishful thinking. The Soviet interest in the ABM Treaty is the same as the interest which *both* superpowers reflected when they entered into the Treaty in 1972. Strict limitations on defensive systems are crucial both to limiting the arms race and to negotiated reductions in offensive strategic systems.

The Committee does, however, recognize the possibility that a nation *could* enhance its international leverage by violating or threatening to violate international norms. Hitler's success in this regard is well known. And certainly the Iranian regime of Ayatollah Khomeini has succeded in using illegal acts to gain considerable international bargaining leverage. Indeed, it managed to use such behavior to extract arms transfers from this very Administration.

But such examples hardly vindicate a practice of flouting international obligations. As a nation which subscribes to the rule of law, the United States has purposefully denied itself certain forms of behavior, whether they provided temporary leverage at the bargaining table or not. We have done so because, as a member of the community of nations, we have concluded that ultimately, in a long and halting march toward some form of world order, benefit for all will derive from the elevation of certain standards to a level of general acceptance and practice.

No standard is more fundamental to civilization than the value of honoring a solemn pledge. While the "reinterpretation" debate has raised many complex and technical questions of international and constitutional law, beneath them all is a simple value with which every American is familiar: the value of honesty.

In seeking to distort the ABM Treaty through the sham of a "reinterpretation," the Administration has denigrated this value in the interest of pursuing a Presidential dream—that the United States can find safety in the nuclear age through the erection of an anti-nuclear astrodome. Some in the Senate support this goal; others regard it as naive, futile, and dangerous. But that debate aside, it should be taken as unarguably true that corrupting our own institutions and constitutional processes is not an effective way to defend the United States of America.

VII. ADDITIONAL VIEWS OF MR. HELMS

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SECTION I. CONSTITUTIONAL PRINCIPLES AND THE TREATY POWER

To call this resolution one of "treaty interpretation" is to highlight what is wrong with S. Res. 167 in law and in fact. The title implies a treaty interpretation made 15 years after the ABM Treaty was ratified. It is meant, moreover, to be a Senate interpretation. The Senate is not empowered in law to interpret treaties, either at the time of its advice and consent to those instruments or years after ratification and subsequent practice. This is not only bad treaty law, but it is also bad constitutional procedure.

Case law and constitutional scholars are clear on one fundamental point—only the President can make a treaty. Only the President can carry out the terms of a treaty, unless enabling legislation and related appropriations are required. The comment of a distinguished scholar in the field of Presidential power, Professor Arthur Miller of the George Washington University Law School, is right on point:

> Treaty-*making* is entirely presidential . . . . There is no requirement that a President "make" a treaty—that is, ratify it—even after it has been negotiated and received the requisite two-thirds approval from the Senate. He is still free, in law if not in politics, not to put it into effect. (*Presidential Power in a Nutshell,* p. 153.)

Subsequent practice gives to the Chief Executive the right to adjust the implementation of a treaty. Professor Borchard in his study entitled "Treaties and Executive Agreements—A Reply," 54 Yale Law Journal, 616, 652 (1945), points out that the President can interpret the meaning of treaties by the mere exchange of diplomatic notes. He can also, according to the Hackworth *Digest of International Law,* Vol. 5, pp. 324-326 (1943), temporarily suspend the operation of a treaty or extend its duration. Moreover, to cite a past Counselor of the Department of State, there have been instances in which a President "acting through the Secretary of State, has tacitly acquiesced in action by foreign governments which had the effect of modifying stipulations in our treaties." See idem, p. 340.

In the advice and consent process, the words of the treaty represent the meaning of the treaty. The *Fourteen Diamonds* case, 183 U.S. 176, 182 (1901), clearly prohibits the Senate from forcing a new interpretation of a treaty at a later date following ratification. The Senate's view of the contents of a treaty can only be conveyed by an understanding or declaration and not by debates on the Senate floor, statements in committee, committee reports, or later assertions by the Senate as to what the treaty meant at the time. This is the holding in *New York Indians* v. *U.S.,* 170 U.S. 1 (1898).

With respect to treaties, the President proposes and the Senate disposes, based upon the four corners of the agreement submitted to it. The Senate can amend, reserve, declare, and even understand, but once it approves the treaty submitted—with or without amendments, reservations, declarations, and understandings—the treaty then goes back to the President, who is entitled to ratify or not to ratify as he sees fit.

SECTION II. THE TREATY POWER

Subsections (1)(A)(B), (2)(A), (2)(E), (3), and (4) are restatements of constitutional law as it is meant to operate. But subsections (2)(B), (C), and (D) are attempts to rewrite constitutional law and to transform the legal process as it relates to the approval and ratification of treaties.

Particularly, in subsection (2)(C), S. Res. 167 would make any Senate pronouncement on the treaty, from statements in the Foreign Relations Committee to statements on the Senate floor, in effect, reservations or understandings which would affect the object and purpose of the treaty as is manifest from its terms as they are written and from the four corners of the document. This is contrary to basic constitutional law and treaty procedure. Treaties cannot be controlled by subsequent explanations of Members of the Senate. See, *Fourteen Diamonds* v. *U.S.,* 183 U.S. 176 (1901); Louis Henkin, *Foreign Affairs and the Constitution* (1972), p. 136.

The demands in subsection (2)(D) that the Senate be informed of every private statement is impractical and constitutionally unsound. In his testimony before the Foreign Relations Committee, Arthur Rovine, former Assistant Legal Adviser for Treaties in the Department of State, called much of S. Res. 167 "misstatements of treaty law." (At p. 6).

SECTION III. TEXT OF THE ABM TREATY

In subsection (2), the second finding of S. Res. 167 quotes from Section (2) of Article I of the ABM Treaty, but omits citing section (1) of that article. Section (1) limits but does not prohibit ABM systems, subject to the other provisions of the treaty. Section (2) deals with a prohibition of deployment for territorial defense, but not research and development (dealt with in later articles of the treaty).

It should be noted that the reference in S. Res. 167 to Article II of the ABM Treaty omits the phrase: "of a type tested in an ABM mode", which has no Russian language equivalent and translates in the Russian language as "of a type tested in an ABM process." There is evident ambiguity between the Russian and the English language versions.

In reference to agreed Statement D, it also must be pointed out that this statement refers only to deployment and not to development or testing. In the Report of the Committee on Foreign Relations, issued in July 1972, there was no reference to a limitation or prohibition of the development or testing of future exotic types of other physical principles (OPP) systems.

SECTION IV. INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE DURING SENATE CONSIDERATION OF THE TREATY

Section (1)(A) of S. Res. 167 represents the main controversy at issue—the definition of what constitutes an ABM system. This subsection claims that representatives of the President communicated to the Senate in 1972 that Article II of the ABM Treaty should be construed functionally and was not limited to the existence of then current technology. That is also the import of subsection (1)(B). First of all, there is no clear and convincing evidence that representatives of the Nixon Administration made such assertions. Second, the use of the very word "construe" implies a change of meaning or a variation of meaning. Thus, the conclusion put forward by subsection (2) is unwarranted by the existing evidence and documentation. Moreover, it again utilizes the term "construe" which implies there is more than one standard view of the Treaty's content.

SECTION V. INTERPRETIVE COMMUNICATIONS OF THE EXECUTIVE FOLLOWING RATIFICATION OF THE ABM TREATY

With respect to the assertions put forward in subsections (1), (2), and (3) of this Section, official U.S. statements made during the period 1978–84 are not indicative of any intent by the U.S. Government to modify the terms of the ABM agreement from their original meaning, which would have the effect of binding this Government to a more restrictive approach to arms limitation than that of the Soviet Union. In 1985 the Legal Adviser to the Department of State completed a preliminary review of the ABM Treaty and concluded that a permissive, or broad, interpretation of development and testing for future (after 1972) OPP–ABM systems was permitted by the Treaty. This conclusion has since been amplified in his carefully documented study, including significant portions of the negotiating record, made available on May 11, 1987. The three subsections to S. Res. 167 cited above also ignore generally and specifically the history of subsequent practice of the ABM Treaty since 1972.

SECTION VI. OBJECT AND PURPOSES OF THE ABM TREATY

Subsection (1) is merely a restatement of Article I of the ABM Treaty which deals with deployment and which has already been examined above. Subsection (2) makes the unwarranted and illogical assumption that since the Treaty was intended by the signatories to be indefinite, then all future OPP systems of any kind and any technology, no matter how revolutionary and unforeseen, would also be forever prohibited. This was not the intent of the drafters of the Treaty, nor is it the result of the content of the Treaty.

The creation in Article XIII of the ABM Treaty of a Standing Consultative Commission to consider compliance in the light of Treaty ambiguities and to consider possible changes in the strategic situation, plus possible future amendments, clearly demonstrates that the drafters of the Treaty did not intend it to be a narrow and inflexible document. This is also underscored by the provision of Article XIV of the ABM Treaty which establishes a periodic review of the entire Treaty and subsequent practice between the parties at 5-year intervals. A periodic review is scheduled to occur in September 1987.

The claim asserted in subsection (5) that prohibition of all future OPP–ABM systems was communicated to the Senate while the Treaty was under consideration is not borne out by the existing evidence. (See the study of the Legal Adviser of May 11, 1987.) The claim that Senate intent controls on the meaning of the Treaty is bad law and bad history. As previously stated, the Senate approves or disapproves a treaty, and then the President makes the treaty and carries out the terms of the treaty. Almost all constitutional lawyers are agreed on this view. Subsequent practice, referred to by subsection (5) bears out and substantiates the so-called broad interpretation of the ABM Treaty.

SECTION VII. DECLARATION OF POLICY

Section 8 places the ABM Treaty hostage to any materials submitted before the U.S. Senate, as interpreted by the U.S. Senate, even after approval and ratification. This is not only unprecedented, but it also is a complete transformation of the American treaty process and constitutional procedure. Section 8(2) does not define the word "admendment" and may well make the ABM Treaty and other future treaties subject to double ratification, with the second ratification to take place at a time when the Senate decides to reconstruct a particular treaty according to its latest wishes.

The conclusions put forward in this Section and the proposed Declaration of the Senate, as contained in this Section, are not borne out by the existing evidence and not supported by existing treaty law or practice. The Senate can only redo a treaty by reservation or amendment. It cannot remake a treaty after a treaty is already made. It cannot redo a treaty after it approves a treaty. The Committee on Foreign Relations and the full Senate can vote a treaty up or vote a treaty down. It can add amendments, reservations, declarations, or understandings. It can direct the President to do, or not to do something, before he ratifies the treaty which the Senate has approved.

Ratifying and executing a treaty is a policymaking process. That is the Executive function. Approving or disapproving a treaty is a Legislative function. That is the essence of the Separation of Powers Doctrine laid down by the U.S. Constitution.

SECTION VIII. THE RHINELANDER REVERSALS

Finally, there are some further comments supporting the broad interpretation of the ABM Treaty that require comment.

First, the broad interpretation of the ABM Treaty is in reality the "traditional" interpretation. The proponents of the narrow, restrictive interpretation infer a Senate interpretation of the ABM Treaty in 1972 on future ABMs, when in fact there was no Senate interpretation. Instead, the Administration in 1972 expressed the broad interpretation, which in fact is the traditional interpretation. Second, the proponents of the Nunn-Levin-Biden narrow interpretation argue that the Senate can interpret a treaty *after* its advice and consent is given, which is contrary to the Constitutional treatymaking powers, the Senate's own Standing Rules, and to American law. Third, the Nunn-Levin-Biden narrow view mandates a particular interpretation of the ABM Treaty which is contrary to the Treaty's own terms, negotiating record, ratification record, subsequent practice record, treatymaking powers, Senate Rules, and customary international law. Finally, but most importantly, the Nunn-Levin-Biden interpretation damages American national security, by preventing SDI development and testing vital to our national defense.

1. Rhinelander's Three Reversals Undercut the Narrow View

One of the principal advocates of the narrow, restrictive interpretation of the ABM Treaty, Mr. John B. Rhinelander, wrote four very interesting but contradictory interpretations of the ABM Treaty just before and after it was ratified. Mr. Rhinelander's writings on the ABM Treaty's interpretation are extremely important, because in 1972 he was chief Legal Counselor to the U.S. SALT I Delegation. Let us briefly trace a chronology of Mr. Rhinelander's three reversals of positions and contradictions on the broad versus narrow interpretation of the ABM Treaty.

In April 1972, Mr. Rhinelander wrote in his official and authoritative legal analysis of the ABM Treaty that the United States and the Soviets had *not* ageed to constraints on the development and testing of future ABM systems based on "other physical principles." Mr. Rhinelander went on to argue that such constraints were important, and needed to be explictly agreed upon in order to complete negotiations of the ABM Treaty. But such constraints never were agreed upon. At this point just before the consummation of the SALT I ABM Treaty, Mr. Rhinelander clearly held the *broad* interpretation of the ABM Treaty.

But in early June 1972, just before the ABM Treaty was submitted to the Senate, Mr. Rhinelander helped to draft an Arms Control and Disarmament Agency-proposed "Treaty submittal package" which argued contrary to the negotiating record that the Soviets and the United States had somehow agreed to constraints on the development and testing of future ABM systems based on "other physical principles." At this point, Mr. Rhinelander clearly subscribed to the *narrow* or restrictive interpretation of the ABM Treaty. This submittal package was never sent to the Senate, but it did reflect Mr. Rhinelander's then-current interpretation.

So it is fair to conclude that Mr. Rhinelander had clearly reversed himself once on how to interpret the ABM Treaty within the space of 3 months.

Then in November, 1973, Mr. Rhinelander wrote authoritatively in the *American Journal of International Law Proceedings* that:

> The [ABM] treaty prohibits the deployment (not *not* the *development or testing*) of "future" ABM systems based on components capable of substituting for ABM missiles, launchers, or radars." (Emphasis added.)

This statement expresses succinctly and precisely the *broad* interpretation of the ABM Treaty. Indeed, it would be difficult to find a better one-sentence summary of the broad interpretation. It is also authoritative, coming from the chief Legal Counselor to the U.S. SALT I Delegation soon after the treaty's negotiation and ratification. Thus by 1973, Mr. Rhinelander had reversed himself again, and had returned to his original view that the broad interpretation was legally correct. This is a second reversal and contradiction.

Finally, Mr. Rhinelander wrote the very next year in the 1974 book *SALT, The Moscow Agreements and Beyond* that:

> Articles II and III provide the treaty framework for the *ban* on "future ABM systems," which is spelled our further in an agreed interpretation . . . Initialed Statement D . . . The future systems ban applies to devices which would be capable of substituting for one or more of the three basic ABM components, such as a "killer" laser or a particle accelerator . . . Article V, on the other hand, *prohibits development and testing,* as well as deployment, of air-based, sea-based, space-based, or mobile land-based ABM systems or components, which includes "future systems" for those kind of environments. The overall effect of the treaty, therefore, is to prohibit any deployment of future systems and to *limit their development and testing* to those in a fixed land-based mode. (Emphasis added.)

This is a very complete formulation of the restrictive or *narrow* interpretation of the ABM Treaty, coming only a year after Mr. Rhinelander had so precisely and succinctly embraced the broad interpretation. Thus Mr. Rhinelander had completely reversed himself and contradicted himself a *third* time.

In sum, Mr. Rhinelander first held the broad interpretation, then the narrow interpretation, then the broad interpretation, then the narrow interpretation. There are three complete reversals and three contradictions in this chronology.

But Mr. Rhinelander has now become the leading "expert" proponent of the narrow, restrictive interpretation. Mr. Rhinelander's three complete reversals and three contradictions on this issue seriously undercut the credibility of all the proponents of the restrictive interpretation. Mr. Rhinelander's three reversals and contradictions suggest that the interpretation of the ABM Treaty has become politicized, rather than being based on the facts. These facts are laid out clearly and succinctly in the Senate Committee on Foreign Relations Minority Report and in the three recently declassified Administration studies. It is highly significant that *originally* Mr. Rhinelander himself clearly supported the broad interpretation. And Mr. Rhinelander is an important witness, as the former chief Legal Advisor to the U.S. SALT I Delegation.

I hope that my colleagues in the Senate, and press, will take the trouble to consult the facts surrounding the controversy over how to interpret the ABM Treaty. One of the reasons for the extended debate on the Defense Bill was to educate our colleagues and the American people about these facts. We will then be able to understand that the so-called traditional interpretation of the ABM Treaty is really the broad interpretation, not the restrictive interpretation. Mr. Rhinelander himself originally held the broad interpretation, and the broad interpretation is clearly supported by the terms of the Treaty itself, the negotiating history, the ratification record, the subsequent practice record, the Constitution's treaty-making powers, the Standing Rules of the Senate regarding treaty-making, and finally by customary international law. And until March 1985, the Soviets have always held the broad interpretation themselves.

2. The Soviets Took the Broad View Between 1972 and 1985

I would remind my colleagues that the late Soviet Leader Leonid Brezhnev told former President Nixon during the May 22–29, 1972 SALT I Summit that the Soviets would go forward with all ABM and strategic offensive programs not *specifically* prohibited in the SALT I agreements. In addition to Marshal Grechko's 1972 statement, this is further authoritative evidence that the Soviets themselves have always embraced the broad interpretation of the ABM Treaty since 1972.

SECTION IX. SUMMARY OF THREE ADMINISTRATION ABM TREATY INTERPRETATION STUDIES

A summary of the Administration's three unclassified reports on ABM Treaty interpretation follows. These reports focus upon the negotiating record, the ratification record and the subsequent practice record.

A. Introduction

1. The Administration has just released studies of the ABM Treaty text, the negotiating record, and the ratification process, prepared by the Department of State Legal Adviser. A third study on subsequent practice, has also been released. Fourth and fifth studies on SDI program structures have also been submitted, but these are classified.

2. The classified documents on which the studies are based are available to Senators in S407 in the Capitol.

3. The studies confirm that the broad interpretation of the ABM Treaty is fully justified. There is no basis in either the *negotiating* record or the *ratification* record for the Senate to presume the imposition of restraints on the United States that have no counterparts restraining the Soviet Union. The Parties agreed to prohibit *deployment* of future ABM systems based on "Other Physical Principles," but did not agree to prohibit their *development* or *testing*. Based on these studies, both the United States and the USSR are fully justified in developing and testing future ABM systems based on "Other Physical Principles."

4. The President is committed to consultation with Congress and our Allies before reaching a final decision with regard to the broad interpretation of the ABM Treaty and the structure of SDI. The release of these five studies is an element in that consultative process.

B. First Study: ABM Treaty Text and Negotiating Record

1. This study has three parts. Part I analyzes the Treaty text, including Agreed Statement D. It concludes that the Treaty text is ambiguous—it may be read in contradictory ways.

2. Unlike the restrictive interpretation, the broad interpretation of the treaty provides a nonredundant and coherent interpretation that fulfills the Treaty's fundamental purpose to ban ABM deployment except as specifically permitted in the Treaty. Agreed Statement D is the only part of the ABM Treaty explicitly constraining future ABM systems based on "Other Physical Principles," yet Agreed Statement D would actually be rendered *superflous* under the restrictive interpretation. The restrictive interpretation would also render Article V(2) *defective,* in actually excluding from constraint ABM systems based on "Other Physical Principles" capable of *continuous fire,* such as laser and particle beam weapons. Moreover, the broad interpretation is consistent with Article 32 of the Vienna Convention on the Law of Treaties, and with Articles 51 and 103 of the United Nations Charter.

3. Agreed Statement D is the only place where the Parties addressed limitations on future ABM systems. Agreed Statement D provides that the Parties may *create* ABM systems based on "Other Physical Principles" than those used in 1972 ABM systems consisting of ABM launchers, missiles, and radars, but may not deploy them prior to negotiating and agreeing with the other Party.

4. The restrictive interpretation considers Agreed Statement D to be a superfluous reiteration of an assumed restraint on the creation and testing of systems based on "Other Physical Principles" contained in Articles II and V.

5. The possibility of different interpretations of the Treaty justifies using other sources of evidence of the Parties' intentions. Part II of the study therefore examines the negotiating record. The negotiating record shows that the United States initially proposed that the Treaty unambiguously ban any future device that might perform the function of an ABM interceptor missile, ABM launcher, or ABM radar. The United States proposed this language for two places in the Treaty: the definitional article, which became Article II, and Article V, which, in the U.S. version, would have banned the development, testing, and deployment of any future

device that could perform the function of an ABM interceptor missile, launcher, or radar and was based in a mobile mode.

6. The Soviets repeatedly and consistently opposed inclusion of such language. They did this intentionally as a matter of principle, arguing that the Treaty could not regulate unknown future systems. The negotiating record demonstrates that the Soviets refused to accept any prohibition in the Treaty on the development and testing of future-type ABM systems based on "Other Physical Principles" (OPP).

7. The negotiating record shows that the Parties compromised their differences on this point in Agreed Statement D. The record makes clear that Agreed Statement D was the linchpin of the Treaty. When it was accepted, the United States dropped its proposal that the main text of the Treaty include reference to the future—the "other devices" formula—and the Soviets agreed to regulate such devices in the event they were created in a manner consistent with the Treaty's fundamental purpose. Thus, in Agreed Statement D, the Parties agreed not to deploy such devices absent discussion and agreement about limitations on such deployment.

8. The record shows that the Soviets accepted the inclusion of the words "currently consisting of" in Article II at the time we accepted the idea of dealing with future systems in an agreed statement. According to the record, we and the Soviets explicitly understood that the regulation of future systems would not be accomplished through Article II.

9. The Soviets consistently in 1972 and afterward took the view that Article II and Article V govern only conventional systems. They consistently rejected our unambiguous proposals to make the Treaty's main text cover future systems. Consequently, in signing the Treaty, the Soviets did not bind themselves to what we call the "restrictive" interpretation of the Treaty. The evidence suggests that they considered themselves free to develop and test OPP systems and their components.

10. Even the Chief Legal Counsel to the U.S. SALT I Delegation, Mr. John Rhinelander, recognized in 1972 that the main text of the Treaty did not clearly regulate future systems. Between February and April 1972, he noted that some U.S. negotiators thought that Article V covered devices other than ABM interceptor missiles, launchers, and radars, but that the United States had not communicated this view clearly to the Soviets and the Soviet position was unclear. Rhinelander suggested that we seek a clarification from the Soviets, but no such clarification was obtained. The U.S. Delegation sought to prohibit development and testing of OPP systems; some U.S. Delegation members believe that they accomplished this. Others, however—notably Henry Kissinger, who was then Presidential National Security Advisor, and Paul Nitze, a key U.S. delegate in the ABM Treaty negotiations—have concluded that the effort was unsuccessful. What U.S. negotiators in fact accomplished was compromise language that led some of them to believe that OPP systems had been restricted, but which does not, in fact, include any specific prohibitions on the development and testing of space and other mobile-based system using "Other Physical Principles." The negotiating record shows that the United States put for-

ward such specific prohibitions, but the Soviets repeatedly and consistently rejected them.

11. The negotiating record makes clear that the broad interpretation is fully justified.

C. Second Study: The Ratification Process

1. The ratification process study also concludes that the broad interpretation is fully justified.

2. In early June 1972 ACDA prepared a draft transmittal package that explained that the ABM Treaty banned "other devices." This draft package thus advanced the restrictive interpretation. The United States had proposed this language to the Soviets, but the Soviets had refused to accept it. *This ACDA package was never used.* The transmitted ratification package which was used did not argue the restrictive interpretation, but instead was consistent with the broad interpretation.

3. The President's 1972 transmittal package to the Senate, and the testimony of the Secretary of State and the negotiators noted that the Treaty and Agreed Statement D banned only the *deployment* of future-type OPP systems. For the most part, they were silent on testing and development and basing mode. The ratification package stated only that *deployment* of future ABM system based on "Other Physical Principles" was banned, but was silent on the specific question of the development and testing of mobile devices. Statements of Secretary of State Rogers and Ambassador Smith followed the thrust of the ratification package. In response to questions about questions whether laser ABM system could be developed and tested, Ambassador Smith replied in the affirmative without qualification, except to say that only *deployment* of such systems would be prohibited. Other Executive Branch witnesses stated that the development and testing of *land-based* laser devices were permitted, from which some Senators *inferred* that development and testing of *mobile* OPP devices were precluded. That inference was supported by some statements of some Administration witnesses who were not negotiators.

4. The Senate's resolution recommending ratification used the same approach as the transmittal package documents. While some Administration witnesses who were not negotiators made statements in hearings that support the restrictive interpretation, the Senate's only method for conveying its views—a reservation to the resolution of ratification—does not exist for the ABM Treaty. There is nothing to suggest that the Senate relied on any view of future-type OPP ABM systems in consenting to ratification. No Senator suggested incoporating any amendment to the treaty itself, any condition, reservation, or understanding with respect to the question; the Senate treated the entire issue as relatively insignificant compared with others posed by the Treaty. The ratification record shows that the Soviets refused to bind themselves to the restrictive interpretation. Ratification was an internal U.S. process that could not of itself create new and independent obligations on the other party to the Treaty; to argue otherwise would require every party to a treaty to monitor the internal ratification processes of all other parties, an untenable result that, moreover, is at odds with international law. Considering the Senate's regular prac-

tice of recording its intention to bind or influence the Executive, the record fails to reflect a generally held understanding by the Senate that would bind the President to the restrictive interpretation.

5. Abundant precedent from Rule 30 of the Standing Rules of the Senate indicates that when the Senate as a body wants to condition its consent to ratification, it does so by reservation to the resolution of ratification or by amendment of the provisions of the treaty itself. The ABM Treaty's resolution of ratification was "clean."

6. As a matter of international law, ratification processes cannot affect obligations of other parties unless such parties agree to be bound by them. In our practice, this agreement would be shown by accepting a proposal to change a treaty.

7. The issues debated in connection with the ABM Treaty and SDI affect our fundamental interests and security. The President seeks to build a consensus about them. He therefore directed that Congress be consulted closely, and said he would take the results of such consultations into account before making any decision with regard to the ABM Treaty and the structure of SDI.

D. Third Study: Introduction and Summary of Conclusions on Subsequent Practice

This is a summary of the third of three parts of a study of the ABM Treaty's application to so-called future ABM systems. The purpose of this three-part study is to ascertain the Treaty's meaning on this issue. The first part, originally prepared in October 1875, and completed in May 1987, examined the Treaty language and negotiating history. It concluded that the Treaty text is ambiguous, and that the negotiating record establishes that the Soviet Union refused to agree to prohibit the development and testing of mobile ABM devices based on other physical principles ("OPP").

The second part, also completed in May 1987, examined the ratification record of the Treaty. It concluded that no change occurred in the international obligations undertaken in the Treaty through any condition, reservation, or understanding. It also found no basis in the Senate record to conclude that the Senate's consent to ratification was premised on a generally held intention that the Treaty prohibit development and testing of mobile OPP devices, or that the Senate had taken any action that would bind the President to the "restrictive" interpretation as a matter of domestic law. The study found, however, that the Senate record contains representations by Executive officers to the Senate which support the restrictive interpretation, upon which Senators could justifiably have relief in granting advice and consent. It concluded that the President should give appropriate weight to such representations and to any understandings reflected in the ratification record even though they may not be binding as a matter of law.

This third and final part of the ABM study examines the agreements and practices of the parties subsequent to ratification of the Treaty. It then describes and applies to the record of subsequent practice the controlling principles of international and domestic law.

This part covers all forms of subsequent practice potentially probative of the parties' intentions with respect to the regulation of

OPP systems. It begins with the period immediately following the ratification of the Treaty, and proceeds up to the President's announcement in October 1985 of the results of a reexamination, in light of the negotiating record, of the meaning of the ABM Treaty as it applies to ABM systems and components based on OPP. An analysis of materials beyond October 1985 would in general have limited utility, because those materials have been widely published and because after that date the relevant materials largely consist of defenses of the interpretations presently at issue. It is noteworthy, however, that Soviet positions advanced since October 1985 differed in material respects from the restrictive interpretation held by the U.S. prior to that time.

This version of the study is unclassified in its entirety. A classified version has also been prepared, including material and appendixes which could not be publicly released because of the need to protect intelligence sources and methods, and the confidentiality of certain diplomatic exchanges. The full classified version has been provided, under appropriate arrangements, to the Senate for examination by Senators.

1. The Record of Subsequent Practice

An evaluation of the significance to be accorded any particular evidence of subsequent practice must be based on controlling legal principles, which are discussed below. One circumstance, however, deserves mentioning at this point. In general, actual conduct by the parties reflecting a common understanding of treaty obligations is entitled to much greater weight than mere statements separated from actual conduct. Likewise, conduct based on a consistent, common understanding of obligations is entitled to much greater weight than actions which cannot clearly be attributed to treaty considerations, or which are based on shifting, vague or inconsistent understandings. Despite the extensive collection of relevant materials in this study, there is little evidence of a pattern of conduct based on a consistent, common understanding of treaty obligations. Most of the evidence examined in this study consists of statements, usually unconnected with any action having probative worth. A principal reason for this has been the fact that the parties have not had the programmatic need or technological capacity for very long to develop and test OPP systems or components that are ABM-capable.

Further, it has often been impossible to ascertain whether conduct by the United States has been common with conduct of the Soviets. Soviet practice cannot be analyzed or evaluated in the same manner as U.S. practice. The Soviet Government publishes no reports of its BMD activities, and internal debates over the scope of Soviet obligations, if they occur, are never revealed. U.S. officials hold a variety of views concerning Soviet behavior in interpreting treaties. One view describes the Soviets as determined to construe their treaty obligations narrowly, but also to avoid or disregard such obligations whenever desirable, as reflected by construction of the Krasnoyarsk radar. Soviet statements concerning the ABM Treaty, moreover, must be regarded as potentially reflecting Soviet interests as perceived at the time each statement is made; this is clearly demonstrated by the variety of inconsistent positions taken by Soviet negotiators between 1972 and 1985.

For the purpose of analysis, the record of subsequent practice has been divided into four periods: (1) 1972–74, when the parties were initiating their compliance with the Treaty and sorting out basic issues; (2) 1974–78, when the parties conducted their first formal 5-year review of the Treaty and negotiated important clarifying interpretations of some of its provisions; (3) 1978–83, when the Executive Branch began publicly to articulate the restrictive view of the Treaty, and to state its applicability to the pre-SDI research program on ballistic missile defense; and (4) 1983–85, when the President announced the SDI program and the United States stated that the restrictive interpretation applied to the accelerated United States effort, while the Soviet Union began to attack SDI on various legal grounds and doubts as to the validity of the restrictive interpretation began to be expressed more widely within the USG.

Between 1972–74, few public statements were made by either government concerning the ABM Treaty. During Soviet ratification proceedings, Soviet Defense Minister Grechko stated that the ABM Treaty did not preclude research and experimentation aimed at solving the problem of defending the country against nuclear missile attack. Other Soviet statements stressed the Treaty's ban on deployment of new systems, and disclaimed any binding effect to unilateral U.S. interpretations.

A strong divergence of views within the Executive Branch, as to the proper interpretation, became evident during the formulation of the internal directive on compliance by the U.S. Government with the Treaty. This directive proceeded from a draft which would have embodied the restrictive interpretation in critical provisions, to a final version which was consistent with either view and left the issue of development and testing of mobile OPP devices for policy-level decision at such time as an OPP system became ready for testing. These changes resulted from disagreement or doubt about the restrictive interpretation in several offices within the Department of Defense; in particular, the three military branches expressed or suggested the view that the restrictive interpretation had been unilaterally assumed by the United States; at the same time, the Joint Staff stated that the instruction "appeared more restrictive than called for by the agreements and in other instances appeared ambiguous." Statements of Executive Branch officials before Congress in this period varied, but were essentially ambiguous. The former legal adviser to the SALT I delegation, John Rhinelander, articulated the restrictive interpretation in an unofficial published commentary.

Between 1974–78, the two sides engaged in bilateral discussions in various contexts which demonstrated the differences and uncertainties which still characterized their thinking on the OPP question. During the early phases of SALT II, the Soviets tabled a proposal regarding new strategic offensive systems based on other physical principles. The U.S. representative reported (after extensive discussion) that he could not ascertain whether the Soviets believed that all such arms should be banned in the absence of agreement to permit them, or permitted in the absence of agreement to ban them; the proposal was later dropped by the Soviets. In the course of these discussions, the U.S. representatives recalled that Agreed Statement D banned the deployment of OPP systems in the absence of agreement to the country, but the Soviet representative (Semenov, who led the USSR ABM Treaty Delegation) suggested that this might not be a correct reading of the Treaty.

During the negotiation in the SALT II Treaty of the definition of independently targetable reentry vehicles, the Soviets accepted the phrase "other devices" for the purpose of including in the provision's regulatory scope future, unknown devices that could serve the functions involved. The Soviets had rejected identical language proposed by the United States for the ABM Treaty, stating then that they opposed coverage in the ABM Treaty text of unknown, future devices. The Soviet SALT II negotiator explained that coverage of current and future ABM devices was achieved in the ABM Treaty through a combination of Article II(1) and Agreed Statement D.

USG preparations for the first formal ABM Treaty Review Conference in 1977 resulted in extensive interagency consideration of a proposal to seek clarification of the OPP question from the Soviets at the Conference. The records associated with this exercise show: (1) that no uniform interpretation of the Treaty existed within the USG, with ACDA advancing the restrictive interpretation, the DCI and the JCS Chairman questioning or rejecting such restraints, and OSD expressing uncertainty as to what the Soviets had agreed; and (2) that the United States remained unclear as to whether or not the Soviet Union agreed with ACDA's "understanding" of the Treaty's limitations on future ABM systems. The USG decided against raising this issue with the Soviets at the Conference. The issue of future systems was raised informally on instructions with a Soviet negotiator, however, who failed to confirm that any obligation existed under the Treaty concerning future systems beyond the obligation to discuss them in the SCC.

In 1978 the two parties concluded clarifying interpretations that dealt, among other things, with the meaning of "tested in an AMB mode" in Article II(1) of the Treaty. In this agreement, and in many prior exchanges, the Soviets emphasized their view that ABM systems regulated by the Treaty were comprised exclusively of the three conventional components listed in Article II. In one provision of the clarifying interpretations, the parties agreed that, if an ABM interceptor missile were given the capability to carry out interception without the use of ABM radars for guidance, application of the term "tested in an ABM mode" would be subject to additional discussion and agreement in the SCC. The record of the discussion of this provision does not clearly indicate a mutual understanding by the parties of its implications: the Soviets made clear that they considered that if an ABM interceptor were given such a capability it would be part of a system based on OPP. The interpretation contemplates that the creation of such a system would be permitted, though the issue of the application of the phrase "tested in an ABM mode" would be subject to discussion and agreement. (Under either interpretation of the Treaty creation would be permitted, but under the restrictive interpretation testing would be limited to a fixed land-based mode.)

Three former U.S. SALT I negotiators made statements during this period supportive of or implying the restrictive interpretation in a written public debate on the issue; protagonists from the Hudson Institute and the Rand Corp. disagreed. Official publications of the USG for the period prior to 1978, including ACDA's *Arms Control and Disarmament Agreements*, are ambiguous, and refer to the treatment of OPPs in Agreed Statement D as a matter separate and distinct from the treatment of mobile and space-based systems in Article V.

Between 1978–83, the Executive Branch stated its position on the interpretation of the ABM Treaty in various public Arms Control Impact Statements ("ACIS") published during that time. The 1979 ACIS (Submitted on February 28, 1978) was prepared in ACDA, and articulated the restrictive interpretation of the Treaty. No legal study or memorandum concerning the Treaty or its negotiating history has been located that might have been used to support this result; a DOD suggestion that the conclusion represented only the "U.S. position" (and, presumably, not necessarily the Soviet position) was rejected on the ground that a public suggestion that the Soviets were not bound would be misleading and unconstructive. Some additional ACIS—particularly those submitted between 1981 and 1983—also supported the restrictive interpretation in varying degrees, as did other Executive Branch reports to the Congress and some legal memorandums in the Department of State. Personnel at the Institute for Defense Analysis objected to early ACIS drafts for incorporating the restrictive interpretation. Some support for these objections was expressed in DOD, but in 1981 a staff-level DOD official prepared an internal review that confirmed the restrictive interpretation, which was approved by other staff-level officials in DOD. A decision was made against referring the issue to appropriate senior, policy-level officials for consideration. The 1981 internal DOD memorandum relied on incomplete study of the negotiating record. Similarly, the State Department legal studies relied on incomplete excerpts from the negotiating record, compiled within ACDA in 1980, and were conclusory on key issues.

During this period, Soviet negotiators noticed public reports of U.S. BMD activities, as well as commentary on possible future plans. They complained that such activities and plans were undesirable. They did not, however articulate a coherent view of the Treaty consistent with the restrictive interpretation.

President Reagan's announcement of the SDI program in March 1983 promised that the program would be conducted within the confines of the Treaty, but did not address which activities beyond research but short of deployment were lawful. Some executive branch statements after the SDI announcement supported the restrictive interpretation. These statements indicated that the Executive Branch held the restrictive view, and that the SDI program was consistent with it. Other Executive reports and statements during the same period were ambiguous.

Actions taken by the United States in the SDI program through October 1985 were consistent with the restrictive interpretation. During this period, the United States stated that its development and testing activities had been designed to be consistent with that interpretation. Those involved in the management of SDI programs found: that the tests planned or conducted required no adjustments for reasons related to the Treaty because the devices involved either were of a type that did not require exceeding the restrictive interpretation or were not ABM components (lacked ABM capability and were not tested in an ABM mode); that the objectives of the SDI program could be met during this period within the restrictive interpretation; and that in any event the United States was not technically capable at that time of changing the test program in ways that would go beyond the restrictive interpretation and at the same time offer significant program advantages.

Prior to October 1985 only one series of SDI tests arguably involved an ABM system or device based on OPP (the Homing Overlay Experiment, or HOE); that test would not have been conducted differently under the broad interpretation because it involved the testing of a fixed land-based ABM system. Otherwise, only planning for future tests (such as the Delta-180 test in September 1986) was affected by the restrictive interpretation during this period.

During 1984 and 1985, certain developments led to a determination within the Executive Branch that the OPP question deserved greater study than it had previously been accorded. DOD officials charged with SDI responsibilities sought guidance on the Treaty's scope and received conflicting advice. U.S. negotiators in talks with the Soviets were puzzled by certain Soviet positions and advised further study of the negotiating record. These and other activities led to substantial differences of views within the Executive branch, causing Secretary of State Shultz to order the Legal Adviser to prepare a report on the subject. The Legal Adviser's October 1985 review of the Treaty text and negotiating record, and the opinions on the study of all relevant policy-level officials in the Administration, formed the basis for President Reagan's decision of October 1985 that a broader interpretation of the Treaty was fully justified. The President also decided, as a matter of policy, that it was then unnecessary to restructure the SDI program in a manner consistent with the broad interpretation.

Congress responded to the President's Strategic Defense Initiative by adopting appropriations for the SDI program that were not conditioned on any interpretation of the Treaty. Congress did, however, legislate and appropriate funds after Executive representations were made that the program would be consistent with the restrictive interpretation.

The SDI announcement caused a dramatic increase in the attention given by the Soviets to the OPP issue. They reformulated their position on the ABM Treaty and advanced several different arguments in an effort to attack the SDI program. Their position has consistently been in support of an interpretation narrower than the restrictive interpretation. They have stated, for example, that research, as well as development and testing, on space-based OPP systems and components, is inconsistent with the Treaty. They advanced other more restrictive interpretations, which would limit in various ways the scope of research permitted on space-based OPP systems, and prohibit all research, development and testing intended ultimately to provide a territorial defense.

These different viewpoints were argued at length in bilateral discussions, but were never resolved. At no time have the Soviets accepted the restrictive interpretation. Furthermore, while the Soviet positions would have the effect of prohibiting development and testing of space-based OPP devices, the Soviet argument regarding Article II(1) was consistent with the broad interpretation, and its views of Articles V(1) were, before October 1985, inconsistent with any position ever held by a U.S. official and have no basis in the Treaty text or negotiating history. Since October 1985, they have adopted a functional definition for ABM systems consistent with the restrictive interpretation of Article II(1). However, their interpretation of Article V(1) prohibitions remains more restrictive than the restrictive interpretation.

No clear evidence has been developed as to what interpretation the Soviets have applied in practice to their own BMD programs. Existing evidence does not convincingly establish that the Soviets have advanced to the development stage with respect to mobile OPP ABM systems; but in light of existing limitations, a confident judgment on this issue is presently impossible. Available evidence clearly establishes, however, that Soviet BMD activities have included research, development and testing of types which they have characterized as inconsistent with the Treaty. The Soviets also plainly violated the Treaty in proceeding with deployment of the Krasnoyarsk radar.

2. Legal Conclusions

International Legal Obligations

International law requires consideration of subsequent agreements and conduct of the parties in construing a treaty, particularly to resolve ambiguities. The strength to be accorded such practice depends upon the evidentiary value of particular activity on the issue being examined. In general, concurrent conduct, reflecting agreed understandings, is entitled to much greater weight than unilateral statements communicated by one party to another; internal deliberations are entitled to little if any weight in ascertaining an agreed understanding. Written agreements represent a particularly valuable source of subsequent conduct, and conduct tends to have greater weight when it is closer in time to the agreement being construed.

The record of subsequent conduct of the parties to the ABM Treaty does not establish that the parties had intended in 1972 to prohibit the development and testing or mobile OPP devices. It does, however, provide important insight into the parties' understandings of these understandings must be considered in arriving at any final judgment on the interpretation of the Treaty.

During negotiation of clarifying interpretations and at other times between 1972 and 1978, the Soviets repeatedly expressed the view that the Treaty was intended to regulate conventional ABM systems. U.S. negotiators disagreed with this view, but accepted the Soviet text in this respect for purposes of the interpretations. These agreed provisions may be read as lending support to the broader interpretation and are entitled to substantial weight in the interpretation of the Treaty. One of the interpretations also contains a provision that deals with an ABM missile that is guided without an ABM radar. The Soviets insisted upon treating the substitute guidance system in the same manner as OPP, making the testing in an ABM mode of such a system subject to discussion and agreement. These agreements relate only to particular aspects of the OPP problem, however, and therefore establish no definitive interpretation of the Treaty's application to development and testing or mobile ABM devices based on OPP.

Apart from the formal agreements of the parties, their exchanges, statements, and conduct on matters relating to the OPP question do not evidence a common and consistent understanding of the Treaty interpretation question. The U.S. position in bilateral discussions before October 1985 appears to have been consistent with the restrictive interpretation throughout this period; U.S. negotiators on several occasions indicated a view consistent with reading Article II(1) and the Treaty proper to regulate OPP systems and components.

Substantial doubt and disagreement, nevertheless, was expressed within the USG at various times throughout this period on the OPP question. These internal doubts and disagreements show that positions implying the broader interpretation were supported throughout the period by knowledgeable individuals. The doubts expressed concerning the restrictive interpretation principally took the form of questioning whether the Soviets had agreed to it. Soviet statements and contentions, particularly during the 1972–79 period, lent credible support to these internal USG doubts, since these statements indicated that the Soviets did not share the restrictive interpretation. Internal evidence is entitled to little, if any, weight under international law, however, as it cannot be treated as common or concordant conduct, establishing agreement as to what the parties meant in 1972 with respect to the interpretation of the Treaty. But the evidence of internal doubt, combined with a lack of Soviet confirmation, reflected the absence of any commonly held view.

The Soviet position in bilateral discussions has changed substantially between 1973 and 1985, evidently in response to the Soviet perception of its national interests. During the period from 1972 to 1978, Soviet negotiators repeatedly took the position that Article II(1) of the Treaty defined ABM systems within the Treaty text as only those consisting of ABM interceptor missiles, launchers, and radars; they never during this period indicated agreement with the restrictive view, and on at least two occasions failed to respond to opportunities to confirm that even the deployment of OPP devices was banned. Soviet statements began to change only around 1979, when the United States published extensive descriptions of its expanded BMD activities and plans; Soviet views shifted dramatically in 1983 after President Reagan announced SDI, when Soviet negotiators expressed views of the Treaty, based primarily on Article I(2), more restrictive in material respects than those of the United States, and on an interpretation of Article V(1) which lacks any basis in the Treaty or its negotiating record.

Actions taken by the United States in its BMD programs through October 1985 (including the SDI program) have been consistent with the restrictive interpretation. This fact does not necessarily indicate a subsequent practice establishing agreement of the parties. During this period, the United States explicitly stated that its development and testing activities had been designed to be consistent with the restrictive interpretation. These tests required no adjustments for reasons related to the Treaty, however, because the devices involved either were of a type that did not require exceeding the restrictive interpretation or were not ABM components (lacked ABM capability and were not tested in an ABM mode). The objectives of the SDI program could be met during that period, moreover, within the restrictive interpretation, and the United States in any event was technically incapable at that time, in the view of SDI officials, of changing the test program in ways that would go beyond the restrictive interpretation and at the same time offer significant program advantages. Prior to October 1985, only planning for future tests was affected by the restrictive interpretation. Finally, these activities were conducted consistent with the restrictive interpretation because that view of the Treaty was reflected in the fiscal year 1979 ACIS, and supported in some subsequent ACIS, without sufficient study.

No comparable record exists with respect to Soviet structuring of its BMD program. We have insufficient evidence to determine whether the Soviets reached the stage at which development and testing activities inconsistent with the restrictive interpretation would have been feasible and useful, but were not undertaken for reasons of Treaty compliance; the Soviets may, moreover, have conducted tests or advanced devices without U.S. detection. Soviet BMD activities, including research and experimentation clearly oriented toward possible future mobile OPP systems, have certainly been inconsistent with the more restrictive views advanced by the Soviet side since announcement of the SDI program (e.g., that the Treaty prohibits research into ABM devices the deployment of which is prohibited). They have also deployed a radar at a place where radars of that type are prohibited under any interpretation of the Treaty.

This record of subsequent practice established no binding international legal obligation by the United States and the USSR to follow the restrictive interpretation. At no time have United States and Soviet views coincided on the application of the Treaty to OPP systems. During the period from about 1983 to October 1985 the statements of the United States and the Soviet Union, though based on different theories, would both have had the result of precluding development and testing of space-based (and presumably other mobile) OPP systems, despite their disagreement on other aspects of the problem. The Soviet view during that period, however, was based on a reading of Article II(1) that is inconsistent with the restrictive interpretation, and in fact supports the broader view, and on a reading of Article V(1) which is radically different from any advanced by the United States and which lacks support in the Treaty language or negotiating history. Only after October 1985 when the broad interpretation was found fully supported by the U.S. Government did the Soviets adopt a functional definition for Article II(1). However, their interpretation of Article V(1) prohibitions remains more restrictive than the restrictive interpretation. Furthermore, this period represents less than 3 of the 15 years since the entry into force of the Treaty. Finally, insufficient proof exists that the parties engaged in conduct probative of the restrictive view that was consistent and common. The parties appear to have been incapable of the most probative forms of conduct during most if not all the period from 1972 to 1985; and we have insufficient evidence in any event to judge whether Soviet behavior was in fact consistent with the restrictive view.

3. Domestic Legal Obligations

As discussed in pp. 42-55 of Part II of this study, the interpretation of a treaty for purposes of domestic law is based, in the first instance, on the principles of international law that govern treaty interpretation. In some respects, however, the obligations of the President under U.S. law with respect to the interpretation of a treaty may draw upon additional considerations, due to the allocation of governmental powers under the U.S. Constitution.

No special preference is given under international law to the interpretations of a treaty made by governmental authorities of either party. In applying the provisions of a treaty for purposes of domestic law, however, U.S. courts will typically give great weight to any reasonable interpretation articulated by the U.S. Executive Branch. As explained in Part II, this results both from the normal deference given to Executive agencies in interpreting Federal statutes, and from the special deference given to the President in the interpretation of treaties as an aspect of conducting the Nation's foreign affairs. While longstanding interpretations by the Executive Branch must be accorded great weight, the Supreme Court has also accorded great weight to an interpretation even though it had not been previously maintained by the Executive Branch.

The President is obliged under U.S. law to comply with constitutionally valid legislation enacted subsequent to the ratification of a treaty, even if it is inconsistent with U.S. international obligations under the treaty. Similarly, communications between the Executive Branch and Congress subsequent to ratification, while usually of little weight under international law, are likely to be given more serious consideration by U.S. courts in the interpretation of treaty provisions for domestic law purposes.

As noted in Part II, the interest in avoiding nonmutual internatioal obligations should be weighed against finding that the President has domestic-law obligations different from those that are binding on the other treaty partner. Furthermore, the President's powers to interpret treaties and to conduct foreign affairs should not be limited absent clear indication that such limitations were specifically intended. On the other hand, while legally binding limitations on Executive discretion are disfavored, the President, must give proper weight in exercising his powers to all relevant matters and evidence, including Executive Branch representations to Congress, and indications of legislative reliance on such representations.

Nothing in the record of subsequent practice of the ABM Treaty binds the President as a matter of domestic law to the restrictive interpretation. Nonetheless, a substantial number of Executive representations have been made to Congress, beginning with the 1979 ACIS, and lasting until late 1985, which support the restrictive interpretation to one degree or another. Relevant statements include those made by SDIO in its 1985 annual report (completed while the

Executive Branch was beginning its first comprehensive review of the negotiating record). Congressional appropriations for SDI during fiscal years 1985–86 were not expressly conditioned on any interpretation of the Treaty; however, Congress has legislated and appropriated funds with these representations on the record, arguably creating an expectation that the restrictive view would continue to be followed. Since October 1985, Congress appropriated funds for fiscal year 1987, but did not condition their expenditure on continued observance of the restrictive interpretation. The body of substantial evidence that supports the broader interpretation has been essentially internal, and only after completion of a legal review in October 1985 has the Executive clearly articulated the broader view and communicated to Congress the evidence and arguments that support it.

The President should give appropriate weight to Executive representations made to Congress, and expectations developed by legislators, during the post-ratification period, in determining and exercising his lawful discretion to interpret the ABM Treaty. Congress, on the other hand, is also constitutionally obligated, in exercising its constitutional powers, to weigh in good faith the full record of evidence relevant to the ABM Treaty's lawful interpretation, and to defer to rasonable Executive judgments as to the meaning of such evidence, including evidence of subsequent conduct.

4. Conclusion

These three administration studies show that there is no justification in the record for the Senate to impose obligations on the United States that are not enforceable against the Soviet Union. They further show that the Administration's position is solidly based in law and the Treaty records Finally, the ABM Treaty cannot invalidate the Constitutional provision concerning the Congress' duty to provide for the common defense.

VIII. ADDITIONAL VIEWS OF SENATORS HELMS, PRESSLER, AND TRIBLE

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THE ANTI-BALLISTIC MISSILE TREATY OF 1972: TREATY FORMATION AND INTERPRETATION UNDER THE U.S. CONSTITUTION

I. INTRODUCTION

Our Administration has stated that the Soviet Union now has an overwhelming strategic offensive first strike capability, and also an emerging nationwide ABM defense. This dangerous strategic imbalance is demonstrable objectively with unclassified data, and it presents a grave threat to American national security. It is precisely what the SALT treaties and negotiation process was supposed to prevent.

President Reagan's Strategic Defense Initiative essentially is our best response to this Soviet threat, but before the United States can deploy SDI we must first develop and test it. The Soviets, too, are hard at work on their own SDI-type systems, and the President has warned that they may be 10 years ahead of the United States in space defenses.

The ABM Treaty has prevented neither a Soviet nationwide ABM defense, nor a Soviet lead in SDI-type systems development. It should not hinder the United States from developing our own responsive SDI either.

The issue is whether the ABM Treaty constrains American SDI development and testing. The Soviet interpretation of the treaty has always been that SDI-type development and testing is permitted for them, but since March 1985 they have tried to induce the United States to adopt a restrictive interpretation. The restrictive interpretation would make the U.S. SDI merely an endless, wasteful research program, thereby eventually choking it off and preventing a U.S. response to the grave Soviet threat. This is why the Soviets are trying so hard to induce the United States to adopt the restrictive interpretation.

The broad interpretation of the ABM Treaty would permit SDI development and testing, but not actual deployment. Unfortunately, it is only SDI deployment that will actually protect us.

The following is the "Summary of Findings" of a lengthy study developed by the minority staff to the Senate Committee on Foreign Relations, which we adopt as our views on this subject.

The Presidents National Security Adviser, Mr. Frank Carlucci, stated on May 5, 1987, that the White House and the NSC Staff also endorsed the thrust of the Minority Staff Report. Mr. Carlucci also has stated that the President intends to veto any legislation, including the State Department Authorization Bill and the Defense Authorization Bill, containing language mandating the restrictive interpretation of the ABM Treaty.

The study is entitled "The Anti-Ballistic Missile Treaty of 1972: Treaty Formation and Interpretation Under the U.S. Constitution." This carefully researched study examines the Constitution and the rules of the U.S. Senate together with the four main sources for interpreting a treaty under international law:

the terms of the treaty itself;
the negotiating record;
the ratification record; and
the subsequent practice of the parties.

Analyzing the first three sources, the study concludes that the broad interpretation of the treaty is legally correct, but Soviet subsequent practice in violation of the treaty gives the United States the right to suspend or even terminate it in whole or in part. Moreover, the study concludes that a fundamental change of circumstances also provides a basis for the United States to amend, supplement, or terminate the treaty.

It would be tragically ironic if, in circumstances of Soviet ABM Treaty violations extreme enough to justify U.S. termination of the treaty, the United States instead should decide to constrain itself unilaterally in such a way that we were prevented from developing SDI as a response to Soviet ABM Treaty break out.

SDI development and testing is vital to American national survival, and the broad interpretation is not only legally correct, but it is also vital to deploying SDI.

We commend this Minority Staff Report to our colleagues. It contains an articulate and thorough exposition of the negotiating record, the ratification record, and subsequent practice supporting the broad interpretation of the ABM Treaty. It shows how the Constitution's treatymaking powers and the Senate's own rules support the broad interpretation. It also shows how international law supports the broad interpretation. The case is strong and compelling.

The proponents of the restrictive interpretation have seriously misrepresented the entire 1972 ABM Treaty ratification process, and have also misconstrued the actions of the Senate in 1972 on the ABM Treaty.

The Minority Staff Report was developed by two very knowledgeable and well-recognized experts. Acting as a consultant to the Minority Staff of the Committee on Foreign Relations, Mr. William R. Harris was the principal drafter. Mr. Harris is a Rand Corp. consultant, and has also been a consultant to the Arms Control and

Disarmament Agency, the Defense Department, the White House, the CIA, and the Senate Select Committee on Intelligence. He is an internationally recognized expert on strategic intelligence and international law. Mr. Harris was also the principal drafter of the highly significant 1983 Report on Soviet SALT Violations of the President's General Advisory Committee on Arms Control. Mr. Harris was assisted by Mr. David S. Sullivan, a Professional Staff Member of the Senate Committee on Foreign Relations specializing in arms control and transfer issues, and also an internationally recognized strategic intelligence and arms control expert.

II. FINDINGS REGARDING THE AGREEMENT OF THE TREATY PARTIES

1. The ABM Treaty instruments are consistent with a permissive or broad interpretation of development and testing rights for ABM systems based on "Other Physical Principles" (OPP.)

2. The ABM Treaty instruments, taken together, are inconsistent with a restrictive interpretation, by which future-type ABM system development rights would be limited to fixed, land-based systems and components. If Article II defining ABM system components encompasses future-type systems for purposes of Articles III through IX, then Agreed Statement D exempting development and testing of ABMs based on "Other Physical Principles" (OPP) would be superfluous, in failing to augment Article III deployment limits. Moreover, Article V(2) would be defective. Article V(2) limits development, testing, and deployment of automatic or semiautomatic systems for rapid reload of ABM launchers, but does not address laser or other directed energy systems with continuous fire capabilities. Thus the text of Article V(2) implies a scope that actually *excludes* future-type or OPP systems.

3. The negotiating record, properly reviewed per Article 32 of the Vienna Convention on the Law of Treaties, indicates:

   (a) the Soviet version of Article II defined an ABM system as one consisting of the three conventional components; i.e. ABM interceptor missiles, ABM launchers, and ABM radars;

   (b) the Soviet delegation accepted inclusion of the phrase "currently consisting of" to precede the list of then-existing ABM components *only* upon *explicit U.S. assurance that the issue of possible constraints on future-type or OPP systems would be settled elsewhere* than in Article II;

   (c) *The Soviet delegation recurringly excluded (or bracketed as nonagreed text) explicit limitations upon future-type or OPP ABM systems within the text of current Article V;*

   (d) Agreed Statement D was the sole textual agreement regulating future-type or OPP ABM systems and components; it mandated discussions before deployment, but *not before development and testing;* and

   (e) neither Agreed Statement D nor a reported oral reference to it in January 1972 established a Soviet commitment to limit future-type or OPP ABM system development to fixed land-based systems.

4. The ABM Treaty instruments and negotiating record establish *unambiguously* that future-type ABM systems and components based upon "Other Physical Principles" than those embodied in

ABM systems existing in 1972 may be developed and tested without limit upon their mode of potential deployment.

5. Future-type or OPP ABM systems or components may be tested as mobile land-based, sea-based, air-based, or space-based systems, so long as a system or component of a system, and not merely a subcomponent, is "created" subsequent to May 26, 1972 and is based on "Other Physical Principles" than those of the systems existing on May 26, 1972.

6. Agreed Statement D, together with Soviet assurances in the course of its negotiation, may be reasonably construed as precluding postdiscussion deployments of future-type OPP ABM systems without amendment of the treaty by agreement of the parties, or by withdrawal from the treaty after 6 months' notice of jeopardy to "supreme national interests" of a party.

7. The Soviet Union may retain a claim-of-right to deploy ABM systems based upon "Other Physical Principles" in a fixed land-based mode after discussion and notice, but without the consent of the United States. The Soviets may claim: fulfillment of "the obligation not to deploy ABM systems and their components *except as provided in Article III* of the treaty," per Agreed Statement D; the right to modernize ABM systems per Article VII; fulfillment of a consultation duty in the Standing Consultative Commission per Article XIII; and no need for specific limitations per Article XIV amendment to the treaty, beyond the 1974 Protocol.

8. Interpreting the ABM Treaty as preserving development and testing rights for future-type OPP ABM systems and components accords with general principles of international law. It preserves a permissive construction, when a restrictive construction would impair on an indefinite basis an attribute of sovereignty, the right of self-defense. It accords with Article 51 of the United Nations Charter, which codifies the inherent right of individual and collective self-defense, and with Article 103 of that Charter, which precludes impairment of Charter rights by subsequent treaties.

III. FINDINGS REGARDING RATIFICATION OF THE TREATY

9. The U.S. Senate gave its advice and consent for the President to ratify the ABM Treaty without any amendment, reservation, declaration, or interpretation whatsoever intended to qualify the obligations of the treaty parties as signed by the President on May 26, 1972.

10. The Senate Rules in effect during consideration of the ABM Treaty were those for the 92d Congress. See S. Doc. 92–1. Review of Rules XXXVI and XXXVII (now revised as Rules XXIX and XXX) indicates that the Senate could act only *as a body,* whether in the procedures for amendment to the treaty text in the Committee of the Whole, or in the procedures for interpretation of the treaty; namely, by amendment to the resolution of advice and consent to ratification by the full Senate, per Rule XXXVII(1). Thus the Rules of the Senate in effect in 1972, then as now, preclude amendment, reservation, or interpretation affecting the obligations of treaty signatories except by action by the Senate *as a body.* See Rule XXXVII.

11. All of the official documents submitted by, and testimony of the officials presumptively authorized to bind the United States in making treaties—the President, the Secretary of State, and the Head of the SALT I delegation—are consistent with a limitation of future-type OPP ABM systems before *deployment* only. Development and testing of future-type OPP ABM systems and components is not prohibited. Moreover, neither in the treaty instruments submitted by the Secretary of State and transmitted by the President, nor in the official testimony of Secretary Rogers and Ambassador Smith was there a single statement explicitly limiting development and testing of future-type OPP ABM systems only to a fixed land-based mode.

12. On June 13, 1972, the President transmitted seven Agreed Statements signed by the heads of delegation, within the ABM Treaty instruments. These are within the scope of the resolution of ratification of August 3, 1972, and are within the treaty instruments exchanged between the two governments on October 3, 1972. These Agreed Statements include Agreed Statement D, and other agreed interpretations. The Senate acted upon the ABM Treaty, including Agreed Statement D, as a body, in accordance with Senate Rule XXXVII. Agreed Statement D establishes a duty, in event that future-type ABM systems or components based on Other Physical Principles "are created in the future:"

> In order to ensure fulfillment of the obligation not to *deploy* ABM systems and their components except as provided in Article III of the Treaty . . . specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII [establishing the Standing Consultative Commission] and agreement in accordance with Article XIV [for amendment] of the Treaty. (Emphasis added.)

13. Senate rules in effect during the 92d Congress, as now, require for amendment, reservation, or binding effect of an interpretation of a treaty more than mere interpretative declaration of either an individual witness or a Member of the Senate in the course of hearings or during Floor debate, unless the Senate as a body formally approves this interpretation by amendment to the treaty or by reservation contained within the resolution of advice and consent to ratification. See Rule XXXVII.

14. Interpretive declarations of witnesses or members during hearings of the Senate Committee on Foreign Relations or the Committee on Armed Services have no effect upon legal duties under a treaty with an unqualified resolution of advice and consent to ratification. The main evidence in the Nunn Report is irrelevant to the role of the Senate in treaty formation. The Senate must act as a body, as in the Committee of the Whole, or as the full Senate, to affect the obligations under a treaty. The Rules of the Senate, together with customary practices under the Rules, as amended, establish that the internal deliberations of committees are not authoritative acts of the Senate for purposes of qualifying obligations under a treaty pursuant to Senate Rule XXXVII (in 1972), now revised as Rule XXX.